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### Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments

Danielle Kie Hart

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# Article

## **STILL CHILLING AFTER ALL THESE YEARS: RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ITS IMPACT ON FEDERAL CIVIL RIGHTS PLAINTIFFS AFTER THE 1993 AMENDMENTS**

**Danielle Kie Hart\***

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I. INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure was amended for the second time in its sixty-four year history in 1993.<sup>1</sup> It was specifically amended, among other reasons, because of the pronounced chilling

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<sup>1</sup> See *infra* Part II.

effects it had on plaintiffs bringing civil rights claims in the federal courts.<sup>2</sup> More specifically, many commentators believed that the threat and, indeed, the disproportionate imposition of large Rule 11 sanctions chilled creative advocacy by deterring civil rights plaintiffs and their attorneys from filing meritorious claims in the federal courts.<sup>3</sup>

The amended Rule has been in effect for nine years now.<sup>4</sup> Unfortunately, based on the research conducted for this article, it does not appear that the amendments have been successful in reducing the Rule's chilling effects. Civil rights plaintiffs are still targeted for Rule 11 sanctions more frequently than other litigants in the federal courts, and they are actually sanctioned at a much higher rate than any other category of litigant.<sup>5</sup> The following story is not an atypical one for a civil rights plaintiff in the federal courts.<sup>6</sup>

An older white male believes that he has been passed up for promotions at work because of his age in violation of the Age Discrimination in Employment Act.<sup>7</sup> He attempts to negotiate a resolution with his employer, but negotiations fail. The employee files a complaint with the Equal Employment Opportunity Commission, which, after investigation, issues a right to sue/no position letter. The employee retains counsel. To sue or not to sue—this is the dilemma. Much of the relevant evidence is in the possession of the employer. The attorney knows that a complaint is not sanctionable under Rule 11 if a plaintiff indicates that his factual contentions are likely to have evidentiary support. But some federal courts employ a heightened pleading standard in civil rights cases, notwithstanding the United States Supreme Court's decision in *Leatherman v. Tarrant County Narcotics*

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<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* text accompanying notes 28-31; see also *infra* Part IV.A.

<sup>4</sup> The amendments took effect on December 1, 1993. See FED. R. CIV. P. 11.

<sup>5</sup> See discussion *infra* Part IV.A.

<sup>6</sup> This story is a hypothetical composite of various cases collected for this article. It does not recount the actual conduct of any particular parties.

<sup>7</sup> The Age Discrimination in Employment Act ("ADEA") is an important response to workplace discrimination; it is an attempt to further protect civil rights. It is interesting to note, however, that most ADEA claims are actually brought by white males who hold managerial or professional positions. See RHONDA REAVES, COST, CUSTOMER PREFERENCE AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (2000) (contrasting the purpose of Title VII, which is to protect traditionally marginalized groups, with what seems to be happening under the ADEA, namely, that the ADEA is primarily being used by white males to protect their wealth and privilege) (manuscript on file with author).



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*Intelligence & Coordination Unit.*<sup>8</sup> After conducting a reasonable investigation, the employee's attorney concludes that there is a plausible basis for believing that a discrimination claim against the employer exists and files a complaint. Two days after service, a warning letter is sent by defense counsel stating that there is no basis for plaintiff's claims, demanding withdrawal of the complaint, and threatening Rule 11 sanctions. Plaintiff does not withdraw his complaint. A few days later, defendant files a motion to dismiss. Included in the motion is a request for Rule 11 sanctions.

At the hearing on the motion to dismiss, the federal district court judge indicates to the parties that she is inclined to grant the defendant's motion, including its request for sanctions, but feels constrained not to until plaintiff has some opportunity for discovery. The judge therefore indicates that she will wait for summary judgment but warns plaintiff and plaintiff's counsel that plaintiff's claims seem shaky at best. The judge denies defendant's motion to dismiss and its request for Rule 11 sanctions. Discovery commences. The litigation is intense and sometimes heated on both sides. Discovery is taking several months; the litigation is dragging on. Defense counsel sends a second warning letter to plaintiff's counsel—if you do not dismiss the complaint with prejudice, we will file a Rule 11 motion. Discovery does not reveal sufficient facts to sustain plaintiff's claim. Plaintiff then files a motion to dismiss his complaint. Defendant refuses to stipulate to the dismissal unless plaintiff agrees to pay its attorneys' fees and costs incurred in the litigation. Plaintiff refuses.

At the hearing on plaintiff's motion, the judge issues an order to show cause why sanctions should not be imposed under Rule 11 for filing the complaint. Plaintiff's motion to dismiss is granted. After final judgment is entered, defendant files its Rule 11 motion asking for all of its attorneys' fees and costs incurred in defending the action. The district court imposes Rule 11 sanctions on plaintiff's attorney pursuant to defendant's motion, finding that the warning letters sent by defense counsel gave plaintiff sufficient notice of the potential problems with his claims and ample time to amend or withdraw the complaint; the district court makes no mention of the fact that no separate Rule 11 motion was filed as required by the amended Rule or that the motion was filed after

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<sup>8</sup> 507 U.S. 163 (1993) (holding that the Federal Rules of Civil Procedure did not permit heightened pleading standards in civil rights cases alleging municipal liability under 42 U.S.C. § 1983).

final judgment when there was no pleading, motion, or other paper for the plaintiff to amend or withdraw. Alternatively, the court also imposes Rule 11 sanctions pursuant to its order to show cause, perhaps acknowledging that defendant's Rule 11 motion is procedurally defective under the 1993 amendments to the Rule, or perhaps not. The district court then awards all of the defendant's attorneys' fees and expenses as an "appropriate" Rule 11 sanction.

Why have the 1993 amendments to Rule 11 not been more successful in reducing the Rule's chilling effects? To begin with, the 1993 amendments could only be successful in this respect if *all* of the following three factors had fallen into place. First, the causes of Rule 11's chilling effects had to be identified and understood. Second, the 1993 amendments had to address those causes specifically. And, finally, the federal courts had to interpret and apply the 1993 amendments in a manner consistent with the Advisory Committee's intent to reduce Rule 11's chilling effects on civil rights plaintiffs in the federal courts. What this last factor required, therefore, was strict construction and consistent application of the revised Rule by the federal courts. Unfortunately, these requirements do not appear to have been achieved in practice.

To unravel these three factors and to fully answer the question of why the 1993 amendments have not been more successful in eliminating or reducing Rule 11's chilling effects, we must start at the beginning. Part II of this Article, therefore, provides a brief history of Rule 11 leading up to the 1993 amendments.<sup>9</sup> It focuses in some detail on Rule 11's chilling effects on civil rights claims as probably the most troubling problem caused by the 1983 version of the Rule; it then examines the causes of the Rule's chilling effects and the specific ways that the 1993 amendments were supposed to address those causes. Part III then examines Rule 11 practice in six federal circuits<sup>10</sup> to see how the federal courts have been interpreting and applying the 1993 amendments.<sup>11</sup> In Part III.A, case law from the federal circuit courts of appeals is

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<sup>9</sup> See *infra* Part II.

<sup>10</sup> The six circuits are the Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits. Three of the circuits, the Fifth, Seventh, and Ninth, were selected because they were surveyed in a Rule 11 study conducted by the American Judicature Society in 1992 (the "AJS study"). See Lawrence Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 949-50 (1992). The AJS study, therefore, will hopefully provide a useful comparison for the more recent data collected. The remaining circuits, the Second, Third, and Sixth, were selected because of the significant amount of Rule 11 activity generated in those circuits. *Id.*

<sup>11</sup> See *infra* Part III.

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analyzed.<sup>12</sup> This Part concludes by finding that there are mixed messages being sent by the federal appellate courts. For example, the circuit courts, for the most part, seem to require strict compliance with many of the procedural requirements of the 1993 amendments, but not always. Significant intracircuit as well as some intercircuit conflicts exist with respect to important provisions of the 1993 Rule. In Part III.B, case law from the federal district courts within the six circuits selected is analyzed.<sup>13</sup> Troubling trends, including problematic uses of the order to show cause procedure and a continued emphasis on monetary sanctions as the sanction of choice for Rule 11 violations, which are suggested by the appellate court opinions, are more pronounced at the district court level.

Based on the case law research in Part III, Part IV ultimately concludes that Rule 11's chilling effects continue in the federal courts and attempts to explain why.<sup>14</sup> Part IV.A examines the specific impact these chilling effects have, and will continue to have, on civil rights plaintiffs.<sup>15</sup> Part IV.B then considers whether Rule 11 should be amended further or repealed.<sup>16</sup> Since neither option is one that appears to be currently on the table, Part IV.C suggests that the federal courts adopt high sanctioning thresholds in interpreting Rule 11 and for imposing Rule 11 sanctions.<sup>17</sup> Part IV.C explicitly recognizes that high sanctioning thresholds privilege some values, like access to court, over others, like efficiency.<sup>18</sup> This privileging of access to the federal courts, however, is intentional, because I find enduring value in access to court for civil rights plaintiffs and, indeed, for all non-mainstream or marginalized litigants asserting novel theories that challenge existing power structures and our present conceptions of the world.

## II. TRYING TO AVOID THE PITFALLS: THE 1993 AMENDMENTS TO RULE 11

The federal district courts have a panoply of sanctioning provisions at their disposal to control not only the litigation before them but also the litigants and attorneys participating in the proceedings as well.<sup>19</sup> But

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<sup>12</sup> See *infra* Part III.A.

<sup>13</sup> See *infra* Part III.B.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See *infra* Part IV.A.

<sup>16</sup> See *infra* Part IV.B.

<sup>17</sup> See *infra* Part IV.C.

<sup>18</sup> See *infra* Part IV.C.

<sup>19</sup> According to the United States Supreme Court,

perhaps no provision is as well known or as controversial as Rule 11 of the Federal Rules of Civil Procedure.<sup>20</sup> Rule 11 has gone through three different incarnations in its sixty-four year history. As originally enacted in 1938, Rule 11 was designed to “promote honesty in pleading” and required a finding of subjective bad faith before sanctions could be imposed.<sup>21</sup> Because bad faith was hard to prove and courts were

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A district court can punish contempt of its authority, including disobedience of its process, by fine or imprisonment, 18 U.S.C. § 401; award costs, expenses, and attorney’s fees against attorneys who multiply proceedings vexatiously, 28 U.S.C. § 1927; sanction a party and/or the party’s attorney for filing groundless pleadings, motions, or other papers, Fed. Rule Civ. Proc. 11; sanction a party and/or his attorney for failure to abide by a pretrial order, Fed. Rule Civ. Proc. 16(f); sanction a party and/or his attorney for baseless discovery requests or objections, Fed. Rule Civ. Proc. 26(g); award expenses caused by a failure to attend a deposition or to serve a subpoena on a party to be deposed, Fed. Rule Civ. Proc. 30(g); award expenses when a party fails to respond to discovery requests or fails to participate in the framing of a discovery plan, Fed Rule Civ. Proc. 37(d) and (g); dismiss an action or claim of a party that fails to prosecute, to comply with the Federal Rules, or to obey an order of the court, Fed. Rule Civ. Proc. 41(b); punish any person who fails to obey a subpoena, Fed. Rule Civ. Proc. 45(f); award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay, Fed. Rule Civ. Proc. 56(g); and make rules governing local practice that are not inconsistent with the Federal Rules, Fed. Rule Civ. Proc. 81.

Chambers v. Nasco, Inc., 501 U.S. 32, 62 (1991) (Kennedy, J., dissenting).

<sup>20</sup> See, e.g., Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 171 (1994) [hereinafter Tobias, *Revision*] (“The 1983 revision of Rule 11 of the Federal Rules of Civil Procedure . . . proved to be the most controversial amendment in the long history of the Federal Rules.”); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 857 (1992) [hereinafter Tobias, *Reconsidering*]. Tobias explains that

Rule 11 has sparked intense debate among the bench, the bar, and writers and has prompted five major studies of its implementation. Judges have issued approximately 2,000 reported opinions, thousands of unreported determinations, and many additional unpublished decisions. There has also been much informal Rule 11 activity. Indeed, the Rule’s influence is so pervasive that federal court practitioners ignore it at their peril.

Tobias, *Reconsidering*, *supra*. See also *Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses to the Courts: The 1993 Amendments to Federal Rule of Civil Procedure 11*, 107 HARV. L. REV. 1629, 1630 (1994) [hereinafter *Developments in the Law*] (“By far the most visible and controversial sanctioning mechanism . . . is Rule 11 of the Federal Rules of Civil Procedure . . .”).

<sup>21</sup> Karen Kessler Cain, *Frivolous Litigation, Discretionary Sanctioning and A Safe Harbor: The 1993 Revision of Rule 11*, 43 U. KAN. L. REV. 207, 209 (1994).

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reluctant to impose sanctions, the 1938 version of Rule 11 was rarely used.<sup>22</sup>

In response to a purported “litigation explosion” in the federal courts,<sup>23</sup> Rule 11 was amended in 1983 as part of a package of

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<sup>22</sup> *Id.* (“From 1950 to 1976 only nineteen Rule 11 motions were reported.”); see also Georgine M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988) [hereinafter Vairo, *Critical*] (stating that the 1938 version of Rule 11 was “largely ignored”); James R. Simpson, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W. L. REV. 495, 496 (1993) (“Due to the difficulty in proving subjective bad faith, the rule was rarely invoked during its first 45 years prior to the 1983 amendment.”); Howard A. Cutler, Comment, *A Practitioner’s Guide to the 1993 Amendment to the Federal Rule of Civil Procedure* 11, 67 TEMP. L. REV. 265, 273 (1994).

When the Federal Rules of Civil Procedure were promulgated in 1938, Rule 11 provided that the attorney’s signature served as certification that there was an adequate foundation in fact and law to support the paper and that it was not filed simply to cause delay. Since the rule required a showing of subjective bad faith to trigger sanctions, and since this showing was very difficult and time-consuming, the rule was rarely invoked prior to the 1983 amendment.

Cutler, *supra*, at 273 (footnote omitted).

Experience shows that in practice Rule 11 has not been effective in deterring abuses . . . . There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate motions.

FED. R. CIV. P. 11 advisory committee’s note (1983 amendment) (citations omitted). See also Marshall, *supra* note 10, at 947 (1992) (“Clearly, the nature of the rules and the general judicial reluctance to sanction attorneys led to the very low incidence of sanctions prior to 1983.”).

<sup>23</sup> Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 485 (1988/1989) [hereinafter Tobias, *Litigation*] (“The [1983] amendment’s adoption was prompted by increasing concern about abuse of the litigation process and about the ‘litigation explosion’—the perception that unprecedented numbers of civil cases were being filed and that too many lacked merit.”).

Beginning in the late 1970s, a chorus of complaints arose about increasing litigation abuse and judges’ reluctance to impose sanctions. It is difficult to identify the factual basis for the complaints of abuse. However, it is clear that the volume of civil litigation in the federal courts . . . had increased and with it the volume of complaints. A number of other factors may also have had an impact: the appearance of new causes of action, such as those created by civil rights, labor, environmental, and securities law, and novel theories of recovery; the expanding use of class actions; and the steep increase in the number of lawyers, particularly those engaged in litigation. As a result, litigation activity mushroomed.

amendments designed to give federal district courts more authority to control litigation.<sup>24</sup> Rule 11's primary purpose was to deter frivolous lawsuits.<sup>25</sup> The 1983 version of the Rule achieved, and continues to achieve, many salutary results. More specifically, "Rule 11 in the federal courts deters careless and ill-conceived filings to a measurable extent. Rule 11 has made attorneys 'stop, look and inquire' before filing. That is

William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 8 (1994) (footnote omitted). *But see infra* text accompanying notes 526-27 (questioning whether a litigation explosion in the federal courts ever existed).

<sup>24</sup> Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 430 (1987) [hereinafter Yamamoto, *Case Management*].

Apart from relying heavily on sanctions to reduce expense and delay, the 1983 amendments to the Federal Rules sought to confirm the authority, and underscore the responsibility, of trial judges actively to manage the pretrial process . . . . Seen as a package, the 1983 . . . rule reforms sought to reduce expense and delay through open-textured rules that gave judges broad discretion to control the pretrial stage of litigation as well as authority to impose sanctions for perceived misuse of the generous pleading and discovery procedures in civil litigation.

Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997).

<sup>25</sup> Cutler, *supra* note 22, at 273.

In the early 1980s, . . . the federal courts experienced a "litigation explosion" marked by overuse of the federal judicial system and abusive litigation practices. In response to this litigation abuse, the Advisory Committee of the Judicial Conference of the United States Supreme Court proposed an amendment to Rule 11 which became effective in August 1983. The 1983 amendment was designed to curb abusive litigation tactics in the federal courts, reduce costly, unnecessary litigation, and ultimately streamline federal litigation by forcing attorneys to stop and think before filing a pleading.

*Id.* (footnotes omitted). *See also* Cain, *supra* note 21, at 207 ("In 1983, an amended version of Rule 11 of the Federal Rules of Civil Procedure was enacted as one means of deterring abusive litigious behavior."). The Advisory Committee commenting on the 1983 amendments stated,

The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation . . . . Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

FED. R. CIV. P. 11 advisory committee's note (citations omitted).

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for the better. Fewer meritless positions are asserted and litigated. Groundless motions and nuisance value claims are discouraged.”<sup>26</sup> But the 1983 version of Rule 11 engendered at least as many problems as it purported to solve:

Federal Rule 11’s curb on “litigation abuse,” . . . has come at an apparently steep price. Judges, attorneys, litigants and scholars complain about excessive Rule 11 litigation, about heightened adversariness, about Rule 11 as a strategic weapon, about the inhibition of creative lawyering and about diminished access to the courthouse for “marginal” litigants.<sup>27</sup>

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<sup>26</sup> Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora’s Box?*, 13 UNIV. HAW. L. REV. 57, 60-61 (1991) (footnotes omitted).

The authors of three substantial rule 11 studies have stated that the amendment has helped to refocus the attention of the federal bench and bar on sanctions, making the judiciary and lawyers keenly aware of their importance . . . . Judge Schwarzer has observed that “rule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law,” that the amendment “has accomplished its drafters’ purpose of causing lawyers to ‘stop and think’ before filing,” and that awareness of the rule’s requirements, “certainly has deterred some frivolous, wasteful or abusive litigation.” Thus, certain of the revision’s purposes have been attained and even the primary problem that prompted the 1983 amendment, the deterrence of abuse, has been ameliorated . . . .

Tobias, *Litigation*, *supra* note 23, at 513-14 (footnotes omitted). See also Marshall, *supra* note 10, at 964 (describing a survey conducted of lawyers practicing in the Fifth, Seventh, and Ninth Circuit Courts of Appeals by the American Judicature Society in which lawyers were asked, “‘What is the biggest impact, if any, of the sanctioning provisions of Rule 11 on your practice?’” and “the leading response . . . was that Rule 11 has generated increased factual investigation before the filing of cases and pleadings, with 22.9% of the respondents citing this as the biggest impact of the Rule”).

<sup>27</sup> Yamamoto & Hart, *supra* note 26, at 60-61 (footnotes omitted). Professor Vairo discusses the “cottage industry” created by the 1983 version of Rule 11 in more detail:

From 1938, when the Federal Rules of Civil Procedure were adopted, to 1983, there were only a handful of reported Rule 11 decisions. During the first three and a half years after 1983, when Rule 11 was amended, 688 Rule 11 decisions were published—496 district court opinions and 192 circuit court opinions. By the end of 1990, over 3,000 cases had been reported.

Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 480 (1991) [hereinafter Vairo, *Where We Are*].

One of the most troubling aspects of the 1983 version of Rule 11 was its “chilling effects.”<sup>28</sup> These chilling effects essentially took two distinct but related forms. First, Rule 11 stifled the development of the common law by “inhibit[ing] vigorous and creative lawyering,” thereby chilling creative advocacy.<sup>29</sup> More specifically, because of the threat of Rule 11 sanctions, lawyers were much less likely to file some novel but meritorious claims that they might otherwise have pursued and/or to make novel legal arguments that may well have prevailed in court.<sup>30</sup> Second, Rule 11 had a disproportionate impact on certain types of litigants and their attorneys; the threat of sanctions “pose[d] special threats to small plaintiffs’ attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups, especially those asserting novel legal theories or reordered social understandings in the form of legal rights.”<sup>31</sup>

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<sup>28</sup> Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 105 (1991) [hereinafter Tobias, *Recalibrated*] (“The most controversial aspect of the implementation of these revisions has been judicial enforcement of [the 1983 version of] Rule 11 in ways that disadvantage or ‘chill’ civil rights plaintiffs and attorneys.”).

<sup>29</sup> Yamamoto & Hart, *supra* note 26, at 61.

<sup>30</sup> *Developments in the Law*, *supra* note 20, at 1642-43; see also *infra* notes 45-46 and accompanying text.

<sup>31</sup> Yamamoto & Hart, *supra* note 26, at 101; *Developments in the Law*, *supra* note 20, at 1643 (“Commentators have also observed that plaintiffs—especially civil rights plaintiffs—feel the chill most acutely, because it is upon them that sanctions disproportionately fall.”); Vairo, *Where We Are*, *supra* note 27, at 483.

Critics feared that Rule 11 would be used to chill access to the federal courts because the rule would be employed aggressively by defense attorneys against litigants like . . . Linda Brown. The reported cases justify those fears and suggest that [the 1983 version of] Rule 11 is being used disproportionately against plaintiffs, and particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by smaller companies.

Vairo, *Where We Are*, *supra* note 27, at 483 (footnotes omitted). See also Scott Nehrbass, *The Proposed Amendment to Federal Rule of Civil Procedure 11: Balancing the Goal of Deterrence with Considerations of Due Process and Fairness*, 41 U. KAN. L. REV. 199, 207 (1992) (“[B]etween 1984 and 1989, more published Rule 11 opinions involved civil rights cases than any other type of lawsuit.”); Christopher D. Wolek, *Practice and Procedure: The “Safe-Harbor” Amendment to Rule 11 . . . Any Port in a Storm?*, 47 OKLA. L. REV. 319, 323 (1994) (“Rule 11 sanctions in Oklahoma’s district courts, as well as the Tenth Circuit Court of Appeals, tend to reflect the [Advisory] Committee’s criticisms on a smaller scale. Plaintiffs and plaintiffs’ counsel have received the overwhelming majority of Rule 11 sanctions in Oklahoma district courts since 1983.”) (footnotes omitted). See generally Tobias, *Recalibrated*, *supra* note 28; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992) [hereinafter, Tobias, *Plaintiffs*]. See also *infra* text accompanying notes 34-44.



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In 1990, as a result of these and other problems created by the 1983 version of the Rule, the Advisory Committee issued a call for written comments on Rule 11.<sup>32</sup> The Advisory Committee seemed to be particularly interested in receiving comments regarding Rule 11's chilling effect on the assertion of meritorious claims by certain kinds of litigants. Of the ten questions on which the Advisory Committee sought comments, three dealt directly with Rule 11's chilling effects.<sup>33</sup>

Several informal and formal studies of Rule 11 were conducted.<sup>34</sup> The early studies found that plaintiffs were sanctioned much more

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<sup>32</sup> Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335, 344-45 (1990) [hereinafter *Call for Comments*]. The Advisory Committee solicited comments on ten different issues. *Id.* at 345.

<sup>33</sup> The three questions were as follows:

4. Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties? Particular concern has been expressed about the effect on civil rights plaintiffs.

5. It has been suggested that there may be a risk of unfairness to groups even if the sanctions rules are administered with unexceptionable even-handedness by the courts. Such unfairness could accrue from differences in the circumstances of parties and lawyers.

Do the sanctions provisions bear, for example, more heavily on plaintiffs' lawyers than defendants' lawyers?

Differing systems of professional compensation may also cause differences in effects of sanctions on lawyer conduct. Perhaps a pro bono lawyer may be more affected by the threat of evenly-administered sanctions than a lawyer representing a client willing and able to invest great resources to wear down a financially weak adversary, and to bear the cost of any sanction imposed . . . .

6. Concern has also been expressed about the appropriateness of the size of some sanctions imposed under the rules . . . . It has been urged that to require a lawyer to bear the adversary's full legal expenses through discovery and trial because of the lawyer's signing of a pleading with inadequate pre-filing investigation could in some cases be excessive, resulting in "over-deterrence" causing lawyers to be reluctant to assert even marginally well-founded contentions for fear of a sanction colossal in relation to potential benefit to the client served. This effect could combine with that previously stated; large sanctions may be more likely to over-deter lawyers of modest resources, or small firms, than large firms better able to distribute the risk of occasional large sanctions . . . . These concerns for over-deterrence embody the related concern that the rule may have a "chilling effect" on the assertion of meritorious claims or defenses generally, or of some particular category of claims or defenses . . . .

*Call for Comments*, *supra* note 32, at 347.

<sup>34</sup> See *infra* note 35 and accompanying text.

frequently than defendants, particularly in civil rights cases. For example,

Professor Nelken, who conducted one early survey, determined that 22.4 percent of the cases in which rule 11 motions were lodged from 1983 to 1985 involved civil rights, although civil rights claims comprised only 7.65 percent of the civil docket, and that defendants invoked the amendment substantially more often than plaintiffs . . . . Professor Vairo who undertook a study of all the reported opinions between August 1983 and December 15, 1987 has offered more disconcerting data. She found that “[the 1983 version of] rule 11 is being used disproportionately against [civil rights] plaintiffs,” that they were being sanctioned at a rate 17 percent greater than plaintiffs in all other lawsuits . . . . The Third Circuit Task Force which examined all rule 11 activity within its geographic scope from July 1, 1987 until June 30, 1988 determined that civil rights plaintiffs and/or their lawyers were sanctioned “at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases,” . . . .<sup>35</sup>

More recent studies provide somewhat conflicting information.<sup>36</sup> The results are probably conflicting, however, because of the very different perspectives being surveyed. In one study, conducted by the Federal Judicial Center in 1990 (the “FJC study”), federal district court judges were questioned.<sup>37</sup> In another study, conducted by the American Judicature Society and published in 1992 (the “AJS study”), attorneys practicing in three federal circuits were surveyed.<sup>38</sup> What is particularly

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<sup>35</sup> Tobias, *Litigation*, *supra* note 23, at 490-91 (footnotes omitted); *see also* Yamamoto & Hart, *supra* note 26, at 103-04.

<sup>36</sup> *See infra* notes 37-46 and accompanying text.

<sup>37</sup> In the FJC study, the Center conducted three different analyses of the effects of Rule 11 in the federal courts. Elizabeth C. Wiggins et al., *The Federal Judicial Center's Study of Rule 11*, 2 FJC DIRECTIONS 3, 3 (Nov. 1991). First, the Center conducted “an in-depth study of Rule 11 activity in cases filed in five federal district courts: Arizona, the District of Columbia, Northern Georgia, Eastern Michigan, and Western Texas.” *Id.* Second, the Center “reviewed all opinions involving Rule 11 activity published in federal reporters from 1984 through 1989.” *Id.* Third, the Center “surveyed all United States district court judges about their experience with Rule 11.” *Id.*

<sup>38</sup> The American Judicature Society commissioned a study of the Fifth, Seventh, and Ninth Circuits. Marshall, *supra* note 10, at 949-50. Twelve-page surveys were then sent to

striking about the FJC and AJS studies is the very different perceptions of Rule 11's impact on the actual practice of law between judges (the FJC study) and lawyers (the AJS study).<sup>39</sup> For example, the FJC study, which focused on federal district court judges' reactions to Rule 11,<sup>40</sup> concluded that sanctions were sought more often against plaintiffs than defendants and that motions for sanctions against plaintiffs were more likely to be granted than those against defendants.<sup>41</sup> The FJC study also concluded,

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the lead attorneys on 400 randomly selected cases during the calendar year 1989-90. *Id.* The response rate "was a remarkable 74.9%, or 3,358 respondents out of 4,494 attorneys surveyed." *Id.*

<sup>39</sup> That federal court judges and the attorneys practicing before them have different perceptions of Rule 11's chilling effects, and impact more generally, is not new. Discussing the 1983 version of Rule 11, Professor Tobias wrote that

Judge Schwarzer remarks that, while rule 11's unpredictability could have a chilling effect, "lawyers should have little to fear in light of the type of conduct that courts have punished [and my] own experience has disclosed no anecdotal evidence of chilling." It is easy enough for federal judges to say that lawyers have little fear, but civil rights practitioners justifiably remain concerned about precisely what activity could be held to contravene the amendment and about the size of the awards that might be imposed . . . . As to Judge Schwarzer's second contention that he has observed no chilling, there is little reason why the experience of a federal judge who rigorously applies rule 11 would reveal a chilling effect. Thus, his failure to detect any is unremarkable, if not irrelevant, yet evidence of chilling has been reported, appears to be increasing, and is being collected.

Tobias, *Litigation*, *supra* note 23, at 508 (footnotes omitted). See also Donna Marino, *Rule 11 and Public Interest Litigation: The Trend Toward Limiting Access to the Federal Courts*, 44 RUTGERS L. REV. 923, 976-77 (1992).

Indeed, judges may view Rule 11 constraints in a very different manner than the attorney or represented party who must bear the consequences the rule imposes. Judge William Schwarzer of the Northern District of California comments that judges "have a somewhat different perspective from that of lawyers, formed by daily exposure to a constant flow of poorly prepared, ill-considered, and often misleading . . . papers." A judge's primary focus may be expediting the litigation, while an attorney's objective is to prevail on behalf of his client; these conflicting duties are bound to clash, creating conflicts between judge, attorney, and client.

*Id.* (footnotes omitted).

<sup>40</sup> The FJC study also monitored federal court docket sheets. See Marshall, *supra* note 10, at 949 n.31.

<sup>41</sup> Wiggins, *supra* note 37, at 19.

Across the five districts, Rule 11 motions/orders targeted the plaintiff slightly or significantly more frequently than the defendant. And in all districts, orders that imposed sanctions also targeted the plaintiff more frequently than the defendant. Given that more of the motions targeted the plaintiff, it is to be expected that more of the orders that

however, that civil rights plaintiffs were not disproportionately impacted by Rule 11.<sup>42</sup> Like the FJC study, the AJS study also found that plaintiffs and their counsel were the target of Rule 11 sanction activity to a far greater extent than defendants and their counsel.<sup>43</sup> Unlike the FJC study, however, the AJS study concluded that civil rights cases were disproportionately impacted by Rule 11. According to that study,

One of the recurring criticisms of Rule 11 is that courts have applied it unevenly against lawyers engaged in

imposed sanctions would also target the plaintiff. In all districts, however, it appears that the difference in number of motions filed against the plaintiff and defendant do not fully account for the difference in the number of sanctions imposed.

*Id.*

<sup>42</sup> *Id.* at 22-23.

Analyzing the overall incidence of Rule 11 motions/orders and the imposition rate of sanctions in civil rights cases does not give a complete picture of the impact of the rule . . . . We therefore examined how frequently represented plaintiffs and their attorneys in civil rights cases encounter Rule 11 motions/orders and at what rate courts grant such motions.

We found that the percentage of motions/orders that targeted represented plaintiffs or their attorneys in civil rights cases was similar to or was slightly to significantly lower than that in the other types of cases with substantial Rule 11 activity in four of the five district [courts studied]. In the fifth district, the percentage in civil rights cases was slightly to significantly higher than that in other types of cases.

We also found that in each district, the imposition rate for represented civil rights plaintiffs and their attorneys was comparable with or slightly to significantly lower than that for all other types of litigants and cases.

*Id.* Judge Schwarzer argues that “[t]o examine Rule 11 through the lens of civil rights cases alone affords a misleading view. Those cases represent only a small piece of the universe of litigation in which Rule 11 operates.” Schwarzer, *supra* note 23, at 34. In interpreting the FJC study, Judge Schwarzer argues further that “[t]he evidence, moreover, shows that civil rights cases have not been disproportionately impacted and that much of the sanctions activity was directed at plaintiffs who were not represented by counsel.” *Id.* Significantly, in response to the comments it received, the Advisory Committee specifically asked “the FJC to refine certain aspects of its preliminary analysis,” namely its data regarding sanctions in civil rights cases. See Tobias, *Reconsidering*, *supra* note 20, at 863 & n.42.

<sup>43</sup> Marshall, *supra* note 10, at 952-53.

We also found, as has been widely reported, that plaintiffs’ counsel has been the target of sanction activity to a far greater extent than defense counsel . . . [T]he plaintiff’s side was the target of sanctions in 70.3% of the cases in which sanctions were imposed. With regard to formal Rule 11 activity not leading to sanctions, the plaintiff’s side was the target in 57.6% of the cases in which such activity occurred.

*Id.*

certain kinds of practices, particularly lawyers representing civil rights plaintiffs . . . . The most interesting findings on this issue relate, as expected, to the frequency of civil rights cases as compared to other types of cases. Although civil rights cases made up 11.4% of federal cases filed, our survey shows that 22.7% of the cases in which sanctions had been imposed were civil rights cases. This frequency is quite dramatic when compared to contracts cases and personal injury cases; contracts cases represent 23.0% of cases filed but account for only 15.9% of sanctions; personal injury cases constitute 19.2% of cases but account for only 15.1% of sanctions. In this regard, our evidence tends to confirm the commentary about Rule 11's disproportionate impact on civil rights cases.<sup>44</sup>

In a related and important vein, two additional findings by the AJS study suggest that Rule 11 also appeared to be chilling creative advocacy, especially in the area of civil rights. First, that study found that "19.3% of respondents [i.e., practicing lawyers] decided not to assert a claim or defense that they felt had potential merit" because of Rule 11.<sup>45</sup> Second, the study found that Rule 11 dramatically impacted the way in which civil rights plaintiffs' attorneys practiced law with 31% of these lawyers stating that they "decided not to assert a claim or defense that [they] felt had potential merit."<sup>46</sup>

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<sup>44</sup> *Id.* at 965-66 (footnote omitted). Professor Tobias states the case made by the AJS study more forcefully. Indeed, he argues that the AJS study shows that Rule 11 as applied has disadvantaged civil rights plaintiffs more than any other category of civil litigant. See generally Tobias, *Plaintiffs*, *supra* note 31.

<sup>45</sup> Marshall, *supra* note 10, at 961. With respect to the AJS study, Rule 11 and civil rights litigation, Professor Tobias writes that the AJS study "indicates that judges sanction civil rights plaintiffs as frequently as all other classifications of parties and that the Rule has led civil rights attorneys to advise clients to abandon perfectly meritorious claims." Tobias, *Plaintiffs*, *supra* note 31, at 1775; see also Charles M. Yablon, *The Good, The Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 85 (1996).

<sup>46</sup> Marshall, *supra* note 10, at 971.

[W]ith respect to civil rights cases, one reason that civil rights lawyers-plaintiffs' side and defense side combined-do not display a dramatically increased level of reaction to Rule 11 is that civil rights defense lawyers appear to be disproportionately unaffected by Rule 11. As the figures presented in Table Fourteen reveal, respondents who identified themselves as spending more than 50% of their time doing civil rights plaintiffs' work were far more likely to be affected by Rule

After reviewing the extensive commentary and other evidence received as a result of its Call for Comments,<sup>47</sup> the Advisory Committee found support for five propositions, two of which are particularly important here. First, the Advisory Committee concluded that “Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants.”<sup>48</sup> Second, the Committee also concluded that “[Rule 11] occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party’s belief about the facts can be supported with evidence.”<sup>49</sup>

Rule 11 was therefore amended in 1993 for the second time in its sixty-four year history.<sup>50</sup> The 1993 amendments were specifically designed to redress,<sup>51</sup> among other things, the Rule’s chilling effects.<sup>52</sup>

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11 than other lawyers in virtually every response category that was measured. For example, 44% of the self-identified civil rights plaintiffs’ lawyers reported that they had advised a client not to pursue a lawsuit that had little or no merit, compared to 13.2% of those who spend most of their time on civil rights defense work. That this disparity is not attributable purely to the plaintiff orientation of this specific question can be seen by looking at the response rates to the question of whether the lawyer decided not to assert a claim or defense that the lawyer felt had potential merit. This question is not particularly plaintiff oriented, yet 31% of civil rights plaintiffs’ lawyers reported having taken this action, compared to 17.9% of those who do civil rights work on the defense side. Similarly, 24% of civil rights plaintiffs’ lawyers reported that they had not filed particular papers that they would have liked to file, compared to 10% of those doing civil rights defense work. Indeed, this may be one of the only classes of lawyers whose behavior tends to mirror the relatively low risk of sanctions they face. It is with respect to this substantial disparity in effect between plaintiffs’ lawyers and defense lawyers that the civil rights area emerges as unique. This can be seen by considering how Rule 11 has affected plaintiffs’ and defense counsel differently in the other category containing a particularly high level of Rule 11 activity—the category labelled “other commercial cases.”

*Id.* (footnotes omitted).

<sup>47</sup> See generally Tobias, *Revision*, *supra* note 20 (setting forth a very good overview of the entire amendment process). See also Vairo, *Where We Are*, *supra* note 27.

<sup>48</sup> Carl B. Rubin & Laura Ringenbach, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 64 (1991).

<sup>49</sup> *Id.*

<sup>50</sup> The amendments took effect on December 1, 1993. See FED. R. CIV. P. 11. See generally Tobias, *Revision*, *supra* note 20 (discussing the amendment process); Vairo, *Where We Are*, *supra* note 27 (explaining the Rule 11 amendment process).

<sup>51</sup> According to Schwarzer, “[t]he overriding purpose of the 1993 amendments was, as the 1993 Advisory Committee’s Notes . . . state, to remedy the problems perceived to have

To understand how the amendments to Rule 11 were supposed to alleviate the Rule's chilling effects, it is necessary and important to understand what caused these effects in the first place.<sup>53</sup>

It appears that Rule 11's chilling effects can be traced to several, and sometimes related, causes including: the amount of discretion committed to federal district court judges, inconsistent application of the Rule, lack of uniform sanctioning procedures, insufficiently rigorous appellate review, the use of Rule 11 as a fee-shifting device, and a substantive bias in the federal courts against certain civil rights plaintiffs.<sup>54</sup> First, significant parts of a Rule 11 decision were left to the discretion of the federal district courts. Although the Rule made sanctions mandatory upon a finding that it had been violated, it was the district court judges who determined, in the first instance, *whether* Rule 11 had been violated and, if so, *what* "appropriate" sanction should be imposed.<sup>55</sup> The discretion vested in the district courts was viewed by

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arisen in the interpretation and application of the 1983 revision of Rule 11." Schwarzer, *supra* note 23, at 12; *see also* FED. R. CIV. P. 11 advisory committee's note ("This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule.").

<sup>52</sup> *Developments in the Law*, *supra* note 20, at 1651 ("The 1993 Amendments seek to . . . reduce the Rule's chilling effects.").

One pervasive theme in [Advisory] Committee deliberations was a concerted effort to respond to criticism of the current Rule. Many members expressly stated that they were attempting to be responsive, and many suggestions testify to this. For instance, concern about chilling, satellite litigation, and judicial economy underlay inclusion of safe harbors and efforts to limit reliance on monetary sanctions.

Tobias, *Reconsidering*, *supra* note 20, at 891. *Cf.* FED. R. CIV. P. 11, advisory committee's note ("This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule.").

<sup>53</sup> The reason for this conclusion is simple—if the causes of the chilling effects were not addressed by the amendments, it would be impossible that the amendments could successfully address the Rule's adverse effects.

<sup>54</sup> These causes were also responsible for the other problems created by the 1983 version of Rule 11. *See, e.g.,* Yamamoto & Hart, *supra* note 26, at 62 (stating that "Rule 11's identified problems in the federal court [which would include the Rule's chilling effects] are traceable to several sources" including low sanctioning thresholds, inconsistent application of the Rule, and "conflicts about values of court access").

<sup>55</sup> Tobias, *Recalibrated*, *supra* note 28, at 107 ("Application of the Rule is a two-stage process: determining whether it has been violated, and, if so, selecting the appropriate sanction."); *cf.* Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 695 (1996) [hereinafter Armour, *Practice*]; Yamamoto & Hart, *supra* note 26, at 82 ("The rule provides little guidance to the trial court about what constitutes an 'appropriate' sanction.").

many as the most problematic aspect of the federal courts' sanctioning practice,<sup>56</sup> primarily because sanctioning decisions are inherently subjective.<sup>57</sup> Judges themselves disagree on whether a given fact pattern violates Rule 11.<sup>58</sup> Indeed, the FJC study found that in nineteen percent of the Rule 11 cases appealed, the federal appellate courts reversed the district courts' Rule 11 decisions based on the merits of the underlying substantive claim.<sup>59</sup> These cases were "particularly troublesome," according to the Federal Judicial Center, because, "[n]ot only was the

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A substantial body of the critical commentary focused on "fine tuning" the Rule's application on a case by case basis and improving the courts' sanctions practice. There was, however, a more fundamental concern raised by some critics: the discretionary nature of the courts' decisions whether or not to deem a claim legally or factually frivolous, the threshold liability issue. These critics were concerned that the lack of doctrinal limitations in the Rule generated inconsistent and conflicting case law and gave undue play to the individual judge's normative assumptions about worthy litigation.

Armour, *Practice, supra*, at 695.

<sup>56</sup> This frequent criticism prompted the Advisory Committee to ask whether the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable . . . . The Civil Rules have generally favored judicial discretion as a means to secure just results and have avoided procedural rigidity. On the other hand, indeterminacy in the sanctions rules can weaken their instructive value . . . . There may . . . be a greater injustice associated with a relatively indeterminate rule that gives rise to punitive consequences . . . .

*Call for Comments, supra* note 32, at 349 (question #9).

<sup>57</sup> See, e.g., Armour, *Practice, supra* note 55, at 695-96 ("[W]hat was most problematic in the courts' sanction practice was the extent to which the courts' subjective judgments were inevitably involved in the interpretation and application of the Rule."); Simpson, *supra* note 22, at 499 ("While the Rule applies an objective standard to judge the reasonableness of a pleading, reasonableness is determined through a judge's subjective beliefs.").

<sup>58</sup> Simpson, *supra* note 22, at 499.

A study that presented 292 judges with ten hypothetical Rule 11 situations found that almost half of the judges would have awarded sanctions while the other half would have found merit. Such a remarkable conflict in application obviously causes attorneys to file only safe claims to avoid the chance of sanctions.

*Id.* "One influential study found that judges surveyed nationwide disagreed substantially on the frivolity of ten sample cases, suggesting that sanctioning was very subjective and dependent upon differences between individual judges." *Developments in the Law, supra* note 20, at 1650.

<sup>59</sup> Wiggins, *supra* note 37, at 15.



claim or defense underlying the sanctions motions arguable, the appellate court found it to be meritorious.”<sup>60</sup>

The corollary problem spawned by these subjective interpretations of the Rule, therefore, was inconsistent application of the Rule both within and among the various federal circuits in practice.<sup>61</sup> Significantly,

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<sup>60</sup> *Id.* at 16.

<sup>61</sup> Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930-31 (1989) [hereinafter Burbank, *Transformation*]. Professor Burbank noted,

Even after a six-year period . . . there is a conflict between or among circuits on practically every important question of interpretation and policy under [the 1983 version of] the Rule, from the content of the duties imposed on a person who signs a paper filed in the district court, to the procedural rights of those who may be sanctioned, the persons or entities on whom sanctions may be imposed, the standard(s) of appellate review, and even to whether sanctions are in fact mandatory for a violation. Moreover, intracircuit conflicts are not uncommon, and in a number of circuits there is no appellate law at all on numerous important questions of interpretation.

*Id.* See also *Developments in the Law, supra* note 20, at 1649-50.

Rule 11's "utter unpredictability" is not only a concern in its own right, but it also aggravates other problems presented by the Rule. Inconsistency arguably . . . increases the ex ante risk that meritorious conduct will be sanctioned and hence the chilling effect of sanctions, and increases the arbitrariness and hence the potential unfairness of sanctions . . . . The frequent claims of inconsistency seem to have some empirical basis. Sanction imposition rates vary drastically among judicial districts, as does the frequency with which judges impose sua sponte sanctions.

*Id.* See also Tobias, *Recalibrated, supra* note 28, at 120-21.

[S]ubstantial variations exist within and among the circuits and probably will persist. Differently constituted panels in the same circuit may issue quite dissimilar Rule 11 opinions. The uncertainty is exacerbated because there is slight chance of convincing a court to grant rehearing en banc . . . . Similar uncertainty and inconsistency exist at the district court level. A substantial amount of the apparently enhanced judicial enforcement has been in those large urban districts that have experienced much of the Rule activity to date. Even in those districts, however, uncertainty exists . . . .

*Id.* See also Tobias, *Reconsidering, supra* note 20, at 860.

Many courts inconsistently interpreted the Rule's language or inconsistently enforced its provisions in similar factual contexts, and there was much satellite litigation involving Rule 11. This activity had harmful implications for many parties, lawyers, and judges, but it particularly disadvantaged civil rights plaintiffs and their attorneys, whose lack of resources can make them risk-averse.

there seems to be some acknowledgment and agreement that inconsistent application of Rule 11 was partly the result of a lack of uniform sanctioning procedures<sup>62</sup> and an insufficiently rigorous standard of appellate review.<sup>63</sup> In any event, inconsistent application of the Rule created chilling effects because lawyers could not predict what would trigger Rule 11 sanctions. As a result, risk-averse lawyers, like civil rights and other resource-poor lawyers,<sup>64</sup> were often deterred from filing meritorious claims.<sup>65</sup>

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*Id.*

<sup>62</sup> *Call for Comments*, *supra* note 32, at 349. The Advisory Committee was aware, for instance, that “[s]ome observers have regarded the procedures employed in sanctions matters to be deficient. It has been contended that the failure to provide a formal structure to the proceeding may have resulted in dispositions of sanctions issues that have been too summary.” *Id.*

One significant aspect of the May 1991 proposal was its prescription of additional, and more specific, procedural requirements for judicial imposition of sanctions. This contrasts markedly with the 1983 Rule which included virtually no procedures. The dearth of procedures meant that numerous judges provided very few, and inconsistent procedures, particularly for satisfying due process.

Tobias, *Plaintiffs*, *supra* note 31, at 1784. See also *Developments in the Law*, *supra* note 20, at 1647-48 (“Rule 11 uncertainty manifests itself in two main ways: (1) through imposition of sanctions without adequate procedural protections, and (2) through judicial inconsistency in Rule 11 application and frequent imposition of sanctions based on hindsight.”) (emphasis added); cf. Judge A. Leon Higginbotham, Jr. et al., *Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.D.R. 159, 167 (1991) (“The lack of clear procedures permits occasional uninformed arrogance.”).

<sup>63</sup> Prior to 1991, the federal circuit courts of appeals adopted different standards of review with some circuits adopting a three-tiered standard. See, e.g., Yamamoto, *Case Management*, *supra* note 24, at 441-42. In 1990, the United States Supreme Court decided the case of *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), in which the Court adopted abuse of discretion as the applicable standard of review for all aspects of federal district courts’ Rule 11 decisions. *Id.* at 405; see Yamamoto & Hart, *supra* note 26, at 90. Significantly, the United States Supreme Court opted for the abuse of discretion standard right at a time when “the Federal Rules Advisory Committee and various commentators [started] questioning whether too much discretion ha[d] been invested in district judges.” Yamamoto & Hart, *supra* note 26, at 90. Indeed, Judge Sam D. Johnson of the Fifth Circuit Court of Appeals lamented that decisions emanating from the various circuit courts, most notably the Fifth Circuit, “reflect[ed] the appellate courts’ tendency to acquiesce in district court sanctions—no matter their size.” Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 658-59 (1991).

<sup>64</sup> Tobias, *Recalibrated*, *supra* note 28, at 109.

Many civil rights plaintiffs and attorneys have an acute lack of time and money. It is important to understand the Rule’s vigorous invocation required civil rights attorneys who litigated in subjective good faith to spend substantial resources defending their reputations

and their wallets. Resource constraints make them particularly susceptible to being chilled by overly enthusiastic application of the Rule.

*Id.*

The second general issue relates to resource-deficient litigants, such as many civil rights plaintiffs, and to their lawyers as well as to certain inherent characteristics of the cases that they pursue. For example, civil rights plaintiffs and attorneys, in comparison to their adversaries, which are often governmental units or in-house counsel, have little access to relevant information and possess limited resources for conducting factual investigations, assembling, analyzing, and synthesizing material, performing legal research, and drafting papers. Civil rights suits, in contrast to private, two-party actions, correspondingly involve public issues and large numbers of individuals and entities.

Tobias, *Revision*, *supra* note 20, at 190-91.

In short, the intrinsic nature of considerable civil rights litigation and the restraints which impede many civil rights plaintiffs and practitioners may make their efforts to comply with Rule 11's strictures covering prefiling inquiries and legal and factual certification seem inadequate. These inherent characteristics, particularly the parties' and attorneys' lack of money, time, power, and access to information involving their cases, also explain why these litigants and their counsel may be risk averse and why Rule 11's invocation might chill their efforts.

*Id.* at 192.

<sup>65</sup> Cutler, *supra* note 22, at 274; *Developments in the Law*, *supra* note 20, at 1647-48 ("Another cause of . . . chilling is that attorneys are often uncertain about how Rule 11 will be administered. This uncertainty deters risk-averse attorneys from bringing some meritorious claims that they would bring if they could accurately predict the risk of sanctions."); Simpson, *supra* note 22, at 499 ("Inconsistent application of the Rule chills creative arguments. Inconsistent application has been the hallmark of Rule 11 activity."); Tobias, *Reconsidering*, *supra* note 9 at 860 ("Many courts inconsistently interpreted the Rule's language or inconsistently enforced its provisions in similar factual contexts . . . This activity had harmful implications for many parties, lawyers and judges, but it particularly disadvantaged civil rights plaintiffs and their attorneys, whose lack of resources can make them risk-averse.") (footnotes omitted).

[W]hile a litigant's conduct under the 1983 amendment was judged under an objective standard of reasonableness, this standard ultimately incorporated a judge's subjective beliefs and led to inconsistent application of the rule . . . . As a result, attorneys could not rely on prior decisions to determine if an inquiry satisfied the rule. Instead, they filed "safe" claims that invited minimal Rule 11 inquiry to avoid the wrath of sanctions. Thus, the rule went beyond its intended goal of deterring abusive tactics and also deterred marginally legitimate claims.

Cutler, *supra* note 22, at 274 (footnotes omitted).

Compounding the chilling effects was the fact that sanctions were mandatory if a Rule 11 violation was found.<sup>66</sup> Furthermore, once found, the overwhelming sanction of choice was monetary sanctions in the form of attorneys' fees.<sup>67</sup> The frequency and size of some of the attorneys' fees awards chilled creative and vigorous advocacy by deterring lawyers from bringing novel, controversial but tenable, or even good faith arguments for a change in the law.<sup>68</sup> Rule 11's potential for chilling

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<sup>66</sup> FED. R. CIV. P. 11 (1983).

<sup>67</sup> The AJS study, for example, found that monetary sanctions were awarded in approximately 95% of the cases in which sanctions were imposed. Marshall, *supra* note 10, at 956-57 ("Notwithstanding [the trial judge's discretion in determining an 'appropriate' sanction], ... we were not surprised to find that the overwhelming majority (95%) of sanctions were not 'warm friendly discussions on the record' but were, in fact, monetary."). "Rule 11 sanctions have typically taken the form of monetary fees payable to the opposing party." Wiggins, *supra* note 37, at 3, 18. The Federal Judicial Center specifically found that, "[i]n the five districts, between 20% and 31% of the rulings imposed sanctions .... The overwhelming majority of these orders included monetary fees payable to the opposing party, from a low of 70% of such orders in Western Texas to a high of 93% in Eastern Michigan." *Id.* at 18; *see also* Johnson, *supra* note 63, at 649; Rubind & Ringenbach, *supra* note 48, at 64 (noting that the Advisory Committee found that Rule 11 "has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction").

Although Rule 11 does not require it, and the appellate courts have made some effort to discourage it, federal district courts have repeatedly employed Rule 11 sanctions to reimburse litigants who incur legal expenses in challenging arguably frivolous motions or pleadings. An award of attorneys' fees to a prevailing party is the favored form of sanction under Rule 11 and, in fact, has become a virtually automatic response to a Rule 11 violation. One commentator has concluded that some form of attorneys' fees award is assessed in ninety-six percent of all cases involving a Rule 11 violation. As a result, Rule 11 has become a device with which courts can coerce and intimidate litigants and their attorneys.

Johnson, *supra* note 63, at 649.

<sup>68</sup> *Id.* at 650.

[W]hile large awards of attorneys' fees can be effective sanctions, they also can be coercive, even debilitating, sanctions .... In addition to their economic effect, large awards of attorneys' fees can stifle the advocacy of novel or controversial positions .... The threat of the imposition of large awards of attorneys' fees ... effectively closes the courts to [good faith arguments to change existing law]. The impending danger of large monetary sanctions inexorably discourages practitioners from pressing positions which, while tenable, depart from the current state of the law.

*Id.* The Advisory Committee was concerned about the potential chilling effects of sanctions in the form of attorneys' fees and, therefore, solicited comments on that very question. *See*

effects was particularly pronounced with litigants who lacked resources.<sup>69</sup>

Finally, as previously discussed, there was evidence to suggest that the 1983 version of Rule 11 was used disproportionately against “federal court plaintiffs generally and . . . non-mainstream claimants particularly.”<sup>70</sup> Some of this higher frequency of sanctions against plaintiffs was to be expected, as plaintiffs initiate litigation.<sup>71</sup> The disproportionate impact, however, convinced many critics and commentators that Rule 11 was not being wielded neutrally and, indeed, that there was a substantive bias against these types of claims in the federal courts.<sup>72</sup>

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*supra* note 33 (quoting question number six of the Advisory Committee’s Call for Comments).

<sup>69</sup> See, e.g., Cutler, *supra* note 22, at 274-75.

In addition to the chilling effect engendered from the unpredictable reasonableness standard under the 1983 amendment, the use of monetary sanctions and the frequent imposition of large fee-shifting awards further frustrated the rule’s intention to insulate attorneys’ creativity, especially when a client had limited resources. An attorney who represented a client with limited resources might employ a conservative approach on behalf of his client in the face of potential Rule 11 sanctions since the client could not shoulder the burden of monetary sanctions.

*Id.* (footnotes omitted). See also Tobias, *Litigation*, *supra* note 23, at 501.

[S]izeable awards in even a few cases, especially those involving civil rights, can discourage individuals and lawyers from commencing and continuing civil rights suits because their lack of resources makes them unusually vulnerable. These problems are epitomized by the selection of monetary sanctions of attorneys’ fees as the sanction of choice—out of a myriad of less onerous possibilities—with the potential for chilling and other difficulties that the alternative entails.

*Id.* (footnotes omitted). See also Yamamoto & Hart, *supra* note 26, at 82-83 (“The federal courts’ emphasis on monetary sanctions and the sizeable amount of well-publicized awards have exacerbated Rule 11’s potential for chilling vigorous advocacy. Small firm and public interest attorneys are especially impacted.”) (footnotes omitted).

<sup>70</sup> Yamamoto & Hart, *supra* note 26, at 104; see also *supra* text accompanying notes 34-44.

<sup>71</sup> Yamamoto & Hart, *supra* note 26, at 104 (“[The] empirical research indicates that ready use of Rule 11 has had a disproportionate impact on federal court plaintiffs generally and on non-mainstream claimants particularly. More frequent sanctions against plaintiffs, the initiators of litigation, might be expected.”).

<sup>72</sup> *Id.*

Some judges and commentators have concluded, however, that Rule 11 has not been wielded neutrally, and that federal court applications of the rule have discriminated against certain classes of plaintiffs and

To alleviate Rule 11's chilling effects, the Advisory Committee made major substantive changes to the Rule, which were designed to reduce the Rule's negative impact on the assertion of novel claims<sup>73</sup> and its

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attorneys. In particular, sanctions are more likely to be imposed against claimants who are perceived as socially or politically marginal and against "public interest" attorneys or attorneys representing unpopular clients or causes.

*Id.* (footnotes omitted). See also Cutler, *supra* note 22, at 275-76 ("[C]ourts have frequently been intolerant of novel theories and have utilized Rule 11 to deter parties from presenting these theories. Although the 1983 amendment addresses likely judicial intolerance, in practice judges have not heeded its warnings.") (footnote omitted); Tobias, *Litigation*, *supra* note 23, at 502 ("The significant number of sanctions motions filed against plaintiffs in [civil rights] actions and the high percentage which have been granted essentially have resurrected the archaic idea of 'disfavored' claims.") (footnote omitted); Vairo, *Where We Are*, *supra* note 27, at 484-85.

It is difficult to generalize about the significance of these statistics. The large number of cases in which sanctions are awarded may mean one of two things: 1) that there are relatively more frivolous civil rights cases, and that these cases are being justifiably dismissed and the offending parties and attorneys rightfully sanctioned; or 2) that Rule 11 is an unfair tool for defendants that allows them to unfairly attack civil rights plaintiffs. Unfortunately, there is ample statistical evidence that the latter is the explanation in far too many cases.

Vairo, *Where We Are*, *supra* note 27, at 484-85 (footnotes omitted). See also Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 365 (1990) [hereinafter Yamamoto, *Efficiency's Threat*] (quoting Judge Carter as saying, "'Rule 11 has not been wielded neutrally' and that applications of the rule evince 'extraordinary substantive bias' against certain minority claims"). But see Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 206 (1999) (arguing that "the studies do not provide sufficient data to conclude that the 1983 version of Rule 11 is non-neutral"); Yablon, *supra* note 45, at 67 (arguing that the cases most frequently sanctioned in the federal courts are "low-probability" cases). A low probability case is one which an attorney reasonably believes has "a low (but not zero) probability of success." Yablon, *supra* note 45, at 67. Professor Yablon concedes that "civil rights cases are indeed being disproportionately sanctioned under Rule 11," but that they are being sanctioned at a higher rate "primarily because a disproportionate number of low-probability cases litigated in federal courts are civil rights actions." *Id.* at 91. Consequently, Professor Yablon would absolve the federal courts of the charge of bias against civil rights cases. *Id.* at 90-91.

<sup>73</sup> Rule 11's "good faith" standard was replaced by a "non-frivolous" standard. See FED. R. CIV. P. 11(b)(2). This "non-frivolous" standard was an attempt to reduce Rule 11's adverse impact on the assertion of novel claims in federal court. See Cain, *supra* note 21, at 219.

[T]he 1993 "warranted by law" clause adds a provision for the establishment of new law. The new clause pertains to claims "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." This addition appears to be a response to

disproportionate impact on plaintiffs trying to assert claims in federal court.<sup>74</sup> While the substantive amendments are significant, the Advisory

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the chilling effect that has been reported as reducing attorneys' enthusiasm for bringing novel claims.

*Id.* (footnotes omitted). See also Simpson, *supra* note 22, at 505 ("[Rule 11(b)(2)] introduces a new standard of 'nonfrivolous[ness]' to judge creative arguments. This creates an 'objective standard' . . . . With a lower standard for frivolousness, creative legal arguments should be less susceptible to sanctions.").

<sup>74</sup> Prior to the 1993 amendments, a plaintiff could not assert factual allegations unless they were warranted by evidence discovered during prefiling investigation. Cutler, *supra* note 22, at 281. As a result, the efforts of those plaintiffs who had a sound basis for a factual assertion were hampered by Rule 11 by requiring "discovery, formal or informal, from opposing parties or third parties to gather and confirm the evidentiary basis for the allegation." *Id.*; FED. R. CIV. P. 11 advisory committee's note. Defendants, on the other hand, were allowed to deny factual allegations based on a lack of information sufficient to form a belief as to the truth of the matters asserted. See FED. R. CIV. P. 8(b); FED. R. CIV. P. 11 advisory committee's note. Under the current version of Rule 11, however, plaintiffs may now make factual allegations that are "likely to have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" without violating the Rule. See FED. R. CIV. P. 11(b)(3). In other words, plaintiffs may now get into federal court with less factual information, especially in those situations where relevant information is in the possession of the defendant or third parties. Thus, Rule 11(b)(3) was designed to equalize the burdens between plaintiffs and defendants, thereby decreasing the disproportionate impact of Rule 11 on plaintiffs trying to get into the federal courts. See Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 *TOURO L. REV.* 7, 64 (1995).

In response to criticisms that the 1983 Rule 11 unfairly and disproportionately affected plaintiffs, the certification with respect to factual allegations has been changed. The attorney or party certifies that the allegations have evidentiary support, and may identify specific allegations that "are likely to have evidentiary support after a reasonable opportunity for . . . discovery." Thus, the plaintiff may allege facts based on information and belief, and seek support for the allegation during discovery, much like defendant's power, under Rule 8(b) "to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation."

*Id.* (footnotes omitted).

Another 1993 change that sought to decrease chilling . . . was the amendment to help "equalize the burden of the rule upon plaintiffs and defendants" by allowing plaintiffs to make factual allegations "likely to have evidentiary support . . . ." This change decreases the burden on plaintiffs and enables them to state a claim if the necessary facts are in the possession of the defendant.

*Developments in the Law, supra* note 20, at 1646 (footnotes omitted). See also Nehrbass, *supra* note 31, at 222 ("Allegations or denials of facts may be included in a complaint and

Committee appears, to a large extent, to have relied heavily on procedure to mitigate the Rule's chilling effects.<sup>75</sup> Consequently, this Article will focus primarily on the procedural requirements the 1993 amendments added to Rule 11 and will address some of the subsidiary issues related to and raised by them.

First, unlike the 1983 version of the Rule, the current Rule 11 includes several specific requirements that must be complied with to invoke the Rule. Thus, Rule 11 sanctions can be initiated in only one of two ways: either by motion of the party or on the court's own initiative.<sup>76</sup> If Rule 11 is invoked by motion, it must be made and filed "separately from other motions or requests"<sup>77</sup> and "shall describe the specific conduct alleged to violate [the Rule]."<sup>78</sup> In addition, a Rule 11 motion must be *served* on the opposing party but cannot actually be filed with the court until twenty-one days after service or such other time as the court may prescribe.<sup>79</sup> If the offending motion, pleading, or other paper has not been appropriately amended or withdrawn within that twenty-one day "safe harbor" period, the Rule 11 motion can then, and only then, be filed with the court.<sup>80</sup> Conversely, if the alleged Rule 11 violation has been corrected, whether by appropriate amendment or withdrawal, the Rule 11 motion should not be filed with the court.<sup>81</sup> The

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identified as 'likely to have evidentiary support . . . ,' thus allowing, at least initially, for more speculative claims to be asserted.") (footnote omitted).

<sup>75</sup> Cf. Johnson, *supra* note 63, at 663-64 ("The most salient change proposed by the Advisory Committee is a thorough reorganization of Rule 11, a change plainly designed to improve the procedures by which sanctions are imposed."); Schwarzer, *supra* note 23, at 19 ("Perhaps the most drastic change is the new procedure for invoking Rule 11.").

<sup>76</sup> FED. R. CIV. P. 11(c)(1)(A), (B).

<sup>77</sup> FED. R. CIV. P. 11(c)(1)(A).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> FED. R. CIV. P. 11 advisory committee's note. According to the Advisory Committee, These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

*Id.*



serving of a separate Rule 11 motion triggers the beginning of the safe harbor period.<sup>82</sup>

Unfortunately, the current version of the Rule does not specifically address the *timing* of a Rule 11 motion, that is, *when* a Rule 11 motion should be served and, if filed, decided by the court.<sup>83</sup> The Advisory Committee notes to Rule 11 do, however, provide some important guidelines. The Advisory Committee states,

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed . . . , a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).<sup>84</sup>

As with the prior version of the Rule, the court, on its own initiative, may also invoke Rule 11. To do so, however, the court must now enter an order specifically describing the conduct violating the Rule and directing the party, its attorney, and/or the law firm "to show cause why it has not violated [the Rule.]"<sup>85</sup> Ordinarily, orders to show cause should only be issued "in situations that are akin to a contempt of court."<sup>86</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Under the safe harbor provision in Rule 11(c)(1)(A), however, "a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn." Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 65 (1994) [hereinafter Vairo, *Prologue*]; see also FED. R. CIV. P. 11(c)(1)(A); *supra* text accompanying notes 76-82. A logical interpretation of the Rule, therefore, would be that a party cannot wait to seek sanctions until after the contention has been disposed of by a judge. In that situation, the safe harbor provision of Rule 11 simply could not be complied with. This interpretation would essentially render the safe harbor provision meaningless. See *infra* Part III.A.1.c, B.3 (discussing this issue in more detail).

<sup>84</sup> FED. R. CIV. P. 11 advisory committee's note.

<sup>85</sup> FED. R. CIV. P. 11(c)(1)(B).

<sup>86</sup> FED. R. CIV. P. 11 advisory committee's note.

There is no safe harbor period for a litigant who withdraws or corrects an alleged Rule 11 violation after an order to show cause has been issued by the court.<sup>87</sup> At the same time, the court is admonished to take any corrective action into account “in deciding what—if any—sanction to impose if, after consideration of the litigant’s response, the court concludes that a violation has occurred.”<sup>88</sup>

Before a court can impose any sanctions, however, Rule 11 explicitly requires that due process be satisfied.<sup>89</sup> More specifically, the party, attorney, and/or law firm that is the subject of the sanctions motion or the order to show cause *must* be given notice of the specific conduct that appears to violate the Rule<sup>90</sup> and a reasonable opportunity to respond.<sup>91</sup> What constitutes “reasonable opportunity to respond” will vary depending on the circumstances.<sup>92</sup>

Even if a Rule 11 violation is found, imposition of sanctions is now discretionary with the federal district courts.<sup>93</sup> In other words, the

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<sup>87</sup> *Id.* There does not appear to be anything in Rule 11(c), therefore, that prevents a federal district court judge from imposing sanctions against a litigant and/or her attorney who has corrected the alleged Rule 11 violation. See Jeffrey A. Parness, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, 83 ILL. B.J. 126, 128 (1995).

<sup>88</sup> FED. R. CIV. P. 11 advisory committee’s note.

<sup>89</sup> This is also a significant change from the 1983 version of the Rule, which did not expressly provide for notice and an opportunity to be heard. See FED. R. CIV. P. 11 (1983).

<sup>90</sup> See FED. R. CIV. P. 11(c)(1)(A), (B).

<sup>91</sup> Rule 11(c) provides in pertinent part that “[i]f, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated . . .” FED. R. CIV. P. 11(c) (emphasis added).

<sup>92</sup> The Advisory Committee states,

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances.

FED. R. CIV. P. 11 advisory committee’s note.

<sup>93</sup> FED. R. CIV. P. 11(c) (“If . . . the court determines that subdivision (b) has been violated, the court *may*, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.”) (emphasis added). Under the 1983 version of the Rule, sanctions were mandatory if the court found a violation of the Rule. See FED. R. CIV. P. 11 (1983). The Advisory Committee provides a non-exclusive list of factors for the federal district courts to consider in “deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances.” FED. R. CIV. P. 11 advisory committee’s note. The list of factors reads:

federal district court is no longer required to impose a sanction even if it determines that Rule 11 has been violated. If the court does decide to impose a sanction, it is required to impose the least severe sanction necessary "to deter repetition of such conduct or comparable conduct by others similarly situated"<sup>94</sup> and is specifically encouraged to impose non-monetary sanctions.<sup>95</sup> In fact, the Advisory Committee takes the position that, "[s]ince the purpose of Rule 11 sanctions is to deter rather than to compensate," any monetary sanction "should ordinarily be paid into court as a penalty."<sup>96</sup> Indeed, monetary sanctions in the form of attorneys' fees may only be imposed where Rule 11 sanctions were initiated by motion of a party, and, even then, they may only be awarded

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Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations.

*Id.*

<sup>94</sup> FED. R. CIV. P. 11(c)(2) ("A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."); *see also*, FED. R. CIV. P. 11 advisory committee's note ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, *subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.*") (emphasis added).

<sup>95</sup> FED. R. CIV. P. 11(c)(2) ("Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature . . ."); *see also* FED. R. CIV. P. 11 advisory committee's note ("The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; *but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary.*") (emphasis added). The Advisory Committee also states that the court has a wide variety of possible sanctions it can impose and lists several examples, none of which includes payment of attorneys' fees. *Id.*

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc.

*Id.*

<sup>96</sup> FED. R. CIV. P. 11 advisory committee's note.

if “warranted for effective deterrence”<sup>97</sup> and “should not exceed the expenses and attorneys’ fees for the services *directly and unavoidably caused by the [Rule 11(b)] violation.*”<sup>98</sup> Attorneys’ fees are *not* available if sanctions are imposed via an order to show cause issued by the court.<sup>99</sup> If sanctions are awarded pursuant to an order to show cause, the court may order monetary sanctions in the form of a penalty to be paid into the court but, even then, only if the order to show cause was issued before the claim(s) were voluntary dismissed or settled.<sup>100</sup>

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<sup>97</sup> FED. R. CIV. P. 11(c)(2). The Advisory Committee contemplates that monetary sanctions will only be “warranted for effective deterrence” in “unusual circumstances,” such as violations of the improper purpose provision in Rule 11(b)(2). FED. R. CIV. P. 11 advisory committee’s note.

<sup>98</sup> FED. R. CIV. P. 11 advisory committee’s note (emphasis added). The Committee provides the following example:

If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself.

*Id.*

<sup>99</sup> FED. R. CIV. P. 11(c)(2).

Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, *or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.*

*Id.* (emphasis added). In addition, “[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2),” which deals with the claims, defenses, and other legal contentions raised during the litigation. *Id.*

<sup>100</sup> FED. R. CIV. P. 11(c)(2)(B) (“Monetary sanctions may not be awarded on the court’s own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.”). The Advisory Committee writes,

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order . . . . The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.

FED. R. CIV. P. 11 advisory committee’s note. Such a restriction on the court’s power was necessary, according to the Advisory Committee, because “[p]arties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case.”

Finally, if the court decides to impose Rule 11 sanctions, the court is now explicitly required to issue an order describing the violating conduct and explaining the basis for the sanction imposed.<sup>101</sup> No such requirement is mandated when the court denies sanctions. Under the 1983 version of the Rule, the court was not similarly required to explain its imposition of sanctions.<sup>102</sup>

Notwithstanding all of the important procedural changes made to Rule 11 in 1993,<sup>103</sup> by far the most significant amendment was the addition of the safe harbor provision in Rule 11(c)(1)(A).<sup>104</sup> The safe harbor provision is deemed by many to be the most significant of the amendments for several related reasons. First, it effectively immunizes from Rule 11 sanctions the litigant who takes advantage of it.<sup>105</sup> Second,

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*Id.* See generally, Gregory P. Joseph, *Sanctions: Rules 11, 26(g), 30(d), and 37, §1927, Inherent Power, Appellate Rule 38, and §1912*, SE63 ALI-ABA 79, 118-19 (1999) (discussing the limitations on the use of monetary sanctions imposed by current Rule 11).

<sup>101</sup> FED. R. CIV. P. 11(c)(3).

<sup>102</sup> See FED. R. CIV. P. 11 (1983); see also, FED. R. CIV. P. 11 advisory committee's note ("If the court imposes sanctions, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions.").

<sup>103</sup> See *supra* notes 73-102 and accompanying text.

<sup>104</sup> Yablon, *supra* note 45, at 98-99.

The most significant of the 1993 changes in Rule 11 may, therefore, well be the "safe harbor" provision, which permits a party to withdraw a "challenged" claim within twenty-one days after a Rule 11 motion is served and thereby avoid the threat of sanctions. The service of a Rule 11 motion can then give plaintiffs' lawyers another chance to stop and think and decide whether a claim that was a long shot when filed still looks worth pursuing. The additional information available at this later stage in the proceedings, plus a chance to avoid sanctions, may well cause lawyers to drop those long shots that don't reveal much chance of success.

*Id.* (footnote omitted). See also Sidney Powell & S. Ann Saucer, *Revised Rule 11: Is It Safer?*, 15 MISS. C. L. REV. 271, 275 (1995) ("The history of the amendment . . . reflects that the safe harbor is meant as a significant change and is a major component of the 1993 amendment's downgrade of the oppressive 1983 Rule."); Tobias, *Plaintiffs*, *supra* note 31, at 1785 n.63 ("The Advisory Committee relied substantially on the safe harbor provision to address criticisms of Rule 11 . . ."); Vairo, *Prologue*, *supra* note 83, at 64 ("The safe harbor is an important protection for Rule 11 targets . . . It immunizes litigants from Rule 11 sanctions if they withdraw the challenged paper."); Vairo, *Where We Are*, *supra* note 27, at 498 ("The safe harbor provision[ ] [is] the most important addition[ ] to the rule. A litigant who has made a mistake should have the opportunity to withdraw a paper without suffering sanctions.").

<sup>105</sup> See *supra* text accompanying notes 79-82.

the safe harbor provision should reduce the number of Rule 11 motions filed and the amount of satellite litigation under the new Rule.<sup>106</sup> Third, the safe harbor provision appears to be the mechanism used by the Advisory Committee to ameliorate the potential harshness of some of the other substantive 1993 amendments.<sup>107</sup> For example, the safe harbor provision may lessen the impact of the Advisory Committee's decision to reject the "pleading as a whole" approach,<sup>108</sup> of the continuing duty imposed by new Rule 11,<sup>109</sup> and of the potential Rule 11 liability of

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<sup>106</sup> Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1016 (1999).

The increased potential for satellite litigation is substantially vitiated by the newly created twenty-one-day safe harbor provision. Under the new Rule, a party moving for Rule 11 sanctions must serve the motion on the opposing party at least twenty-one days prior to filing it with the court. Thus, the party alleged to be in violation of the Rule is able to correct the filing prior to incurring liability.

*Developments in the Law*, *supra* note 20, at 1640 (footnotes omitted).

<sup>107</sup> See *infra* notes 108-110 and accompanying text.

<sup>108</sup> The current version of Rule 11 requires a litigant to certify that the "claims, defenses, and other legal contentions," as well as "the allegations and other factual contentions" satisfy the Rule's standards. FED. R. CIV. P. 11(b)(3) (emphasis added); see also, Schwarzer, *supra* note 23, at 14. Theoretically, a certification requirement that applies to each claim, defense, or contention may invite repeated Rule 11 motions, thereby undermining some of the benefits of the safe harbor provision. See Vairo, *Where We Are*, *supra* note 27, at 498-99. The Advisory Committee and others, however, appear to believe that the safe harbor provision will actually reduce any potential punitive consequences of this amendment because sanctions cannot be requested, let alone imposed, unless the opposing party is given the opportunity presented by the safe harbor to correct or withdraw the offending allegation. See, e.g., *Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, 146 F.R.D. 515, 524 (1992) [hereinafter *Judicial Conference Committee Report*] (noting that the Advisory Committee Note accompanying the 1993 revisions "emphasize that Rule 11 motions should not be prepared—or threatened—for minor, inconsequential violations . . . . These changes, coupled with the opportunity to correct allegations under the 'safe harbor' provision[], should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.") (emphasis added); Schwarzer, *supra* note 23, at 15.

A valid claim, defense, or contention will no longer provide cover for others that are frivolous or baseless. However, since sanctions cannot now be imposed unless the opposing party has first been given an opportunity to withdraw the offending allegation, [there is a] substantial reduction in the punitive consequences of the amendment

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Schwarzer, *supra* note 23, at 15.

<sup>109</sup> Pursuant to Rule 11(b), a litigant cannot continue to assert a position previously taken, if that position has become untenable, without violating Rule 11. See FED. R. CIV. P. 11(b). Despite the fact that the continuing duty requirement "adds a new dimension to Rule 11," Judge Schwarzer takes the position that "[t]he impact of this continuing duty will . . . be

attorneys, law firms, and parties.<sup>110</sup> Finally, the safe harbor provision should also help to reduce Rule 11's chilling effects.<sup>111</sup>

Taking the 1993 amendments to Rule 11 as a whole, the Advisory Committee appears to have made a concerted effort to address the causes of the Rule's chilling effects and, thus, the chilling effects themselves.<sup>112</sup> More specifically, the amendments clearly attempt to constrain the discretion of the federal district courts to impose Rule 11

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ameliorated by the 'safe harbor' provision of Rule 11." Schwarzer, *supra* note 23, at 16. "Because the opponent must give notice of intent to move for sanctions with respect to an allegation, the proponent of that allegation will have an opportunity to consider whether it should be withdrawn before being exposed to the risk of sanctions." *Id.* at 17.

<sup>110</sup> Rule 11 now authorizes sanctions against "the attorneys, law firms, or parties who have violated" the Rule. FED. R. CIV. P. 11(c). Potential liability for a Rule 11 sanction, therefore, has been purposefully expanded by the 1993 amendments. At least part of the reason for this expanded liability is the existence of the safe harbor provision itself. See *Judicial Conference Committee Report, supra* note 108, at 525.

*Given the opportunity under the "safe harbor" provisions to avoid sanctions, imposed on a motion, coupled with the changes designed to reduce the frequency of "fee-shifting" sanctions that have produced the largest monetary sanctions, the Committee has added . . . language clarifying that a law firm should ordinarily be held jointly accountable in such circumstances.*

*Id.* (emphasis added). In other words, "[b]ecause of the safe harbor provision, courts may expect supervising attorneys, such as law firm partners, to evaluate whether to withdraw the offending paper. If the supervising attorneys decline to do so, they must risk facing the consequences." Hirt, *supra* note 106, at 1018.

<sup>111</sup> One commentator writes that

since the twenty-one day safe harbor period enables a litigant to amend or withdraw a contention without penalty, the provision provides protection to parties with limited resources or those who assert unpopular claims. These parties, who under the 1983 amendment arguably refrained from asserting a controversial claim or position, fearful of the imposition of monetary sanctions, can completely avoid Rule 11 sanctions by amending or withdrawing a pleading during the twenty-one day period. Ultimately, the safe harbor should limit the rule's chilling effect on litigation.

Cutler, *supra* note 22, at 287 (footnotes omitted). See also, Tobias, *Plaintiffs, supra* note 31, at 1784-85 ("If the safe harbor provision functions as intended, it could protect civil rights plaintiffs, especially those who lack resources or pursue nontraditional, political, or close lawsuits. A safe harbor provision *may* also reduce the chilling effects of Rule 11.") (footnotes omitted); Tobias, *Reconsidering, supra* note 20, at 876 (stating that the safe harbor provision's "inclusion was an important means of responding to criticism of Rule 11, especially its tendency to chill") (footnote omitted).

<sup>112</sup> See *supra* notes 54-72 and accompanying text (discussing the causes).

sanctions<sup>113</sup> by setting forth specific procedures and guidelines governing sanctioning decisions<sup>114</sup> and by explicitly limiting the use of monetary sanctions, especially with respect to sanctions imposed on a court's own initiative.<sup>115</sup> In so doing, Rule 11's chilling effects are potentially minimized by decreasing the incentives for filing Rule 11 motions in the first place and decreasing the chances that such motions will be granted if filed.<sup>116</sup>

Those same procedural requirements are also an attempt by the Advisory Committee to provide uniformity among sanctioning decisions in the federal courts.<sup>117</sup> Uniformity should help litigants and their attorneys predict what will trigger Rule 11 sanctions<sup>118</sup> and, therefore, somewhat alleviate the fear of risk-averse lawyers, like civil rights and other resource-poor lawyers, that Rule 11 sanctions will be imposed for filing unpopular but meritorious claims in federal court.<sup>119</sup>

Furthermore, the amendments will not only make obtaining Rule 11 sanctions more costly,<sup>120</sup> they should also make it much less likely that

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<sup>113</sup> See Schwarzer, *supra* note 23, at 24 (noting that "[t]he impact of the exercise of [judicial] discretion will be tempered by the safe harbor and substantially moderated sanctions provisions").

<sup>114</sup> See *supra* text accompanying notes 76-92.

<sup>115</sup> See *supra* notes 93-100 and accompanying text.

<sup>116</sup> See Jerold S. Solovy et al., *Sanctions Under Rule 11*, 601 PLI/LIT 105, 146 (1999) ("The 1993 amendment discourages monetary awards as sanctions on the ground that fee awards create a financial incentive to file Rule 11 motions. Like the pre-1993 rule, the amended rule gives courts discretion as to the nature of an appropriate sanction; unlike the pre-1993 rule, the amended rule constrains that discretion."); *Developments in the Law*, *supra* note 20, at 1646 ("Both the safe harbor provision and the shift to discretionary sanctions decrease chilling primarily by reducing the likelihood that sanctions will be imposed.").

<sup>117</sup> See *supra* text accompanying notes 76-92.

<sup>118</sup> Simpson, *supra* note 22, at 507 ("For general and specific deterrence, attorneys must know what conduct violated the rule so that they can conform their conduct.").

<sup>119</sup> See Cutler, *supra* note 22, at 268.

[I]n altering the sanctioning process, the 1993 amendment will counteract the chilling impact that Rule 11 had on litigants with limited resources. The courts' permissive standard for the imposition of sanctions coupled with limited authority to impose monetary sanctions will likely minimize the financial disincentives these parties faced under the 1983 amendment. As a result, the new sanctions guidelines will likely reduce the discriminatory nature of Rule 11 against litigants with limited resources.

*Id.*

<sup>120</sup> For example, requiring a separate motion should make Rule 11 sanctions more difficult and, therefore, costly to obtain thereby dissuading litigants from using a Rule 11



monetary sanctions will be awarded even if sanctions are imposed.<sup>121</sup> By de-emphasizing monetary sanctions, the amendments potentially increase creative and vigorous advocacy by reducing the financial *disincentives* of resource-poor litigants to file meritorious claims in federal court.<sup>122</sup> They also potentially reduce the disproportionate impact of Rule 11 on civil rights plaintiffs and/or their attorneys by, one, decreasing the financial *incentives* of parties to file Rule 11 motions in the first place<sup>123</sup> and, two, admonishing the federal district courts to take into consideration the responsible party's ability to pay when awarding monetary sanctions under the Rule.<sup>124</sup>

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motion solely for the purpose of obtaining attorneys' fees. See Cutler, *supra* note 22, at 267-68.

Since litigants are required to file a Rule 11 motion separate and distinct from case pleadings, a request for attorney's fees can no longer be added to the end of a substantive, case-specific motion. Instead, attorneys must prepare a separate, independent motion to initiate Rule 11 proceedings, for which litigants may be unwilling to pay. Therefore, parties should be dissuaded from utilizing Rule 11 solely to garner attorney's fees.

*Id.* See also Tobias, *Revision*, *supra* note 20, at 207.

The 1993 Rule requires counsel as well as unrepresented litigants to submit sanctions motions independently of other documents that they file and to describe the specific infraction alleged to violate the Rule. These strictures are, in part, intended to make the pursuit of sanctions more onerous, thereby reducing Rule 11 activity.

*Id.*

<sup>121</sup> See *supra* notes 93-100 and accompanying text.

<sup>122</sup> See *supra* text accompanying note 116.

<sup>123</sup> Clearly, if less Rule 11 motions are filed, less will be granted against plaintiffs and/or their attorneys, especially in the area of civil rights.

<sup>124</sup> Cutler, *supra* note 22, at 290 ("In reducing the frequency of attorney's fees as a Rule 11 sanction, the 1993 amendment should reduce the rule's adverse impact on pro se parties, sole practitioners, and other litigants with limited resources."); see also Tobias, *Revision*, *supra* note 20, at 210.

The Advisory Committee also exhibited solicitude for the needs of litigants and lawyers who have little money or power, such as numerous civil rights plaintiffs and their counsel, by inserting three admonitions in the Advisory Committee Note. The Committee first suggested that partial fee reimbursement might be an adequate deterrent to Rule 11 violations by individuals with modest resources. For similar reasons, the revisers also included in the Note the following fact as one of an enumerated list which courts could properly consider in choosing appropriate sanctions: "[W]hat amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case." The Note also

Finally, the findings requirement imposed by the 1993 amendments is potentially significant. It could help mitigate some of the inconsistent applications of Rule 11 by the federal courts by providing an important aid to appellate review. By providing a clearer record of what constitutes sanctionable conduct and why, the appellate courts should be able to develop clearer and more consistent Rule 11 standards. Clearer standards, in turn, should reduce the likelihood that litigants in the federal courts will choose *not* to bring meritorious claims because they will know in advance what conduct will trigger Rule 11 sanctions. In a related vein, the findings requirement should also limit any arbitrary imposition of Rule 11 sanctions. More specifically, the amendments make the use of improper bases for Rule 11 sanctions, such as a substantive bias, harder to hide by requiring the federal district courts to explain their decisions to impose sanctions.<sup>125</sup> To the extent that substantive bias accounts for some of Rule 11's disproportionate impact on civil rights plaintiffs in the federal courts, this amendment should help alleviate that phenomenon as well.<sup>126</sup>

Ultimately, however, *whether* a violation of Rule 11 has occurred and, if so, *what* sanction to impose continue to be matters left to the substantial discretion of the federal district courts.<sup>127</sup> As a result, the

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admonished judges against relying on Rule 11 for fee-shifting which would contravene the standards governing statutory fee awards, as required by the *Christiansburg Garment* opinion, in litigation pursued under legislation which prescribes fee awards to prevailing parties.

Tobias, *Revision*, *supra* note 20, at 210 (footnotes omitted).

<sup>125</sup> See *supra* text accompanying notes 89-92, 101; see also Armour, *Practice*, *supra* note 55, at 728.

The assumption that underlies the adjudicative process is that the openness and thoroughness of the analysis at the trial court level, when coupled with a commitment to provide a detailed record for appeal, fosters neutrality, objectivity, and adherence to external legal standards. This element of public and institutional scrutiny is intended to restrict the courts' reliance upon highly personalized, subjective, or internalized standards or the influence of bias in reaching the final result.

Armour, *Practice*, *supra* note 55, at 728 (footnote omitted). See also *id.* at 777 ("[C]oncerns about bias or undue subjectivity can only be redressed if the court makes the context of its sanctions analysis explicit.").

<sup>126</sup> Armour, *Practice*, *supra* note 55, at 728.

<sup>127</sup> See FED. R. CIV. P. 11 advisory committee's note ("Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court . . .").

Advisory Committee also opted to retain abuse of discretion as the applicable standard of review for the trial courts' Rule 11 decisions.<sup>128</sup> Thus, while it seems safe to say that the Advisory Committee relied primarily on procedural amendments in 1993 to mitigate Rule 11's chilling effects, the critical question that remains to be answered is whether those amendments have been effective. To answer this question, it is necessary to examine how the 1993 amendments to Rule 11 have been applied by the federal courts in practice. This discussion is taken up in the next two Parts of this Article.

### III. RULE 11: PRACTICE AND PROCEDURE IN THE FEDERAL COURTS

To determine whether the 1993 amendments to Rule 11 have effectively mitigated the Rule's chilling effects, case law from six federal circuits was collected and analyzed.<sup>129</sup> It is important to note at the outset that the purpose of this article is not to conduct a circuit by circuit analysis. It is not an attempt, in other words, to determine how each of the six federal circuits selected here approaches and/or applies Rule 11 in practice. Instead, the case law from these circuits will be analyzed and the data will be extrapolated to get a sense of Rule 11 practice in the federal courts *in general*.

#### A. *The Federal Circuit Courts of Appeals*

The procedural amendments can be organized in two broad categories, namely, the Rule 11 motion and Rule 11 via an order to show cause. The issues raised in these broad categories will be addressed in turn along with other subsidiary Rule 11 issues raised by the 1993 amendments, such as the timing of sanctions motions and orders to show cause, "appropriate" sanctions, and the effectiveness of appellate review.

One of the frequent criticisms of the 1983 version of Rule 11 was that it was not applied consistently in the federal courts and, therefore, resulted in unpredictability.<sup>130</sup> The AJS study lent some support to this

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<sup>128</sup> *Id.*

<sup>129</sup> The circuits selected are the Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits. See *supra* note 10 for a brief discussion of why these particular circuits were chosen.

<sup>130</sup> See *supra* note 61 and accompanying text; see also, Marshall, *supra* note 10, at 981 ("One of the widespread criticisms leveled against federal courts' application of Rule 11 is that different circuits have varied widely from other circuits."); Wiggins, *supra* note 37, at 3.

conclusion when it found that the three circuits it surveyed did in fact apply Rule 11 differently.<sup>131</sup> In contrast, the FJC study found that there was “a moderate to high level of inter-judge agreement in reviewing sanctions decisions,”<sup>132</sup> i.e., at the appellate level.<sup>133</sup> The research collected here, however, appears to both support and refute these studies.<sup>134</sup> On the one hand, there does appear to be significant agreement among most of the circuits examined with respect to many of the procedural requirements added by the 1993 amendments, but not always. In fact, significant *intracircuit* conflicts exist with respect to several of the 1993 procedural amendments. On the other hand, *intercircuit* conflicts appear to exist with respect to some of the amendments. In short, very mixed messages are being sent by the federal circuit courts of appeals, not only to the litigants and attorneys in

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One criticism of Rule 11 is that there is too little predictability in its application because there are no clear standards as to what constitutes a violation of the rule. The essence of this criticism is that the rule is too indeterminate, resulting in inconsistent interpretation and use across judges and courts.

Wiggins, *supra*, note 37, at 3.

<sup>131</sup> Marshall, *supra* note 10, at 981.

The Seventh Circuit, for example, has the reputation of being the most aggressive enforcer of Rule 11, while the Ninth Circuit has developed a reputation as being one of the more passive enforcers of the Rule, and the Fifth Circuit is generally considered to be somewhere in between . . . . [T]he results of our survey are consistent with the circuits' reputations: 9.9% of respondents from the Seventh Circuit reported having been involved in a case involving imposition of sanction during the previous twelve month period; 7.6% of respondents from the Fifth Circuit reported such involvement; while only 6.2% of the lawyers from the Ninth Circuit were involved in a case in which sanctions had been imposed during the past year. Moreover, the most striking difference was in the rate of sanctions imposed. We found that the Seventh Circuit had the highest rate of sanctions imposed as a proportion of motions filed (24.5%), with the Fifth and Ninth Circuits having a considerably lower rate (14.6% and 14.4%, respectively).

*Id.* (emphasis and footnotes omitted). According to the AJS study, however, the differences in how Rule 11 was applied in the three circuits was not a result of significant differences in the legal standards or procedures employed by the federal courts in those circuits. *Id.* at 983.

<sup>132</sup> Wiggins, *supra* note 37, at 3, 27 (emphasis added).

<sup>133</sup> Wiggins, *supra* note 37, at 14-16 (discussing agreement between the district courts and the circuit courts).

<sup>134</sup> A total of forty-three federal appellate cases were collected for this article. See *infra* Appendix 1.

those circuits, but also to the federal district court judges who make the Rule 11 decisions in the first place.

### 1. The Rule 11 Motion

As previously discussed, under the 1993 amendments, a Rule 11 motion must be made separately from other motions and served on the non-moving party twenty-one days prior to filing with the court.<sup>135</sup> Several related questions are thus raised. Is a separate motion actually required, or are letters or other informal warnings enough to satisfy Rule 11? Is the moving party absolutely required to give the non-moving party twenty-one days to withdraw or amend the document alleged to violate Rule 11? Finally, given the safe harbor provision, when does a Rule 11 motion have to be served and filed? Each of these issues will be addressed in turn.

#### a. The Separate Motion Requirement

The separate motion requirement is strictly construed in the Second, Seventh, and Ninth Circuits, which means that an actual motion is required to satisfy Rule 11; a warning letter or other informal notice of potential Rule 11 sanctions is insufficient.<sup>136</sup> Failure to comply with the separate motion requirement in those circuits has resulted in the reversal of an award of sanctions.<sup>137</sup>

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<sup>135</sup> See FED. R. CIV. P. 11(c)(1)(A).

<sup>136</sup> *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (acknowledging that defendant gave plaintiff multiple warnings but concluding that such warnings were not motions "and the Rule requires service of a motion"); *L.B. Foster Co. v. America Piles, Inc.*, 138 F.3d 81, 89-90 (2d Cir. 1998) (reasoning that plaintiff's inclusion of its request for Rule 11 sanctions in a letter requesting a Rule 54(b) certification "fail[ed] to give [defendant] the separate notice referred to in Rule 11"); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996) (holding that warning letter from party seeking sanctions and request for Rule 11 sanctions in a memorandum in support of a motion to dismiss did not satisfy formal notice requirement imposed by separate motion requirement). According to the Ninth Circuit, "[i]t would . . . wrench both the language and purpose of the amendment to the Rule to permit an informal warning to substitute for service of a motion." *Barber*, 146 F.3d at 710.

<sup>137</sup> See *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (holding that defendant construction company was not entitled to Rule 11 sanctions because it failed to comply with the separate motion requirement when it included its Rule 11 motion along with a motion for summary judgment); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2d Cir. 1999) (rejecting defendants' argument to treat their affidavit of services and reply affidavit as a motion for Rule 11 sanctions because a motion must "be made separately from other motions or requests") (citation omitted); *L.B. Foster Co.*, 138

The Sixth Circuit, however, has taken a different approach. In *Barker v. Bank One, Lexington, N.A.*,<sup>138</sup> for example, plaintiff filed a complaint against forty different defendants, all of whom he claimed conspired to deprive him of his inheritance in a will contest.<sup>139</sup> In April and June of 1995, attorneys for several of the defendants wrote to plaintiff's counsel warning him that the action was frivolous and that they would seek sanctions.<sup>140</sup> Plaintiff did not respond to the letters.<sup>141</sup> On September 28, 1995, the complaint was dismissed as to those defendants.<sup>142</sup> On April 11, 1996, final judgment was entered.<sup>143</sup> On May 9, 1996, defendants served their Rule 11 motion and subsequently filed it on May 31, 1996.<sup>144</sup> The district court granted defendants' Rule 11 motion on April 29, 1997, and imposed \$15,726.75 in attorneys' fees jointly against plaintiff and his attorney and \$12,914.05 in attorneys' fees against plaintiff alone.<sup>145</sup>

On appeal, the Sixth Circuit affirmed the Rule 11 sanctions, holding that the warning letters provided plaintiff's counsel with specific notice of defendants' intent to seek Rule 11 sanctions and "more than sufficient time" either to convince his client to voluntarily dismiss the complaint or to withdraw from further representation.<sup>146</sup> The problem, of course, is that the Sixth Circuit's holding in *Barker* clearly contradicts the plain and explicit language of Rule 11(c)(1)(A), which requires that a separate motion, not a warning letter, be served.

In a related vein, the Sixth Circuit has also held that the separate motion requirement is satisfied where a Rule 11 motion is combined

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F.3d at 89-90 (reversing district court's order granting plaintiff's Rule 11 motion because, among other things, of plaintiff's failure to comply with the separate motion requirement); *Johnson*, 74 F.3d at 151 (holding that there was no Rule 11 motion by defendants for the district court to rule on when defendants merely included a request for Rule 11 sanctions as part of their memorandum in support of their motion to dismiss); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995) (reversing the district court's order granting defendant's Rule 11 motion in part because of defendant's failure to comply with the separate motion requirement).

<sup>138</sup> No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998).

<sup>139</sup> *Id.* at \*1.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*2.

with a request for other sanctions.<sup>147</sup> Such a motion does not run afoul of the separate motion requirement, according to the Sixth Circuit, because the separate motion requirement is “intended to highlight the sanctions request by preventing it from being tacked onto or buried in motions on the merits, such as motions to dismiss or for summary judgment.”<sup>148</sup> Despite the fact that Rule 11 explicitly requires a Rule 11 motion to “be made separately from other motions or requests,”<sup>149</sup> there does not appear to be anything fundamentally wrong with the Sixth Circuit’s approach here. More specifically, allowing other requests for sanctions to be combined with a Rule 11 motion does not seem to run afoul of the intent behind the separate motion requirement, namely, to avoid tag-along Rule 11 motions. This approach also appears to have beneficial consequences, such as avoiding duplicative motions for sanctions, which should save all parties involved (including the court) time, money, and/or other resources.

b. The Safe Harbor Provision

Federal circuit court experience with the safe harbor provision has produced conflicts both between and within the circuits, with the internal circuit disagreements being particularly pronounced. The safe harbor provision has been held to be an absolute requirement in opinions by the Fifth, Sixth, Seventh, and Ninth Circuits—the provision must be complied with for sanctions to be imposed by the district court.<sup>150</sup>

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<sup>147</sup> *Ridder v. City of Springfield*, 109 F.3d 288, 294 n.7 (6th Cir. 1997) (rejecting plaintiff’s argument that defendant’s “motion for sanctions was not ‘separate’ because [defendant] moved for sanctions and/or attorney fees pursuant to Rule 11, 42 U.S.C. § 1988, and 28 U.S.C. § 1927”).

<sup>148</sup> *Id.* The court also reasoned that to require Rule 11 motions to be filed separately from other sanctions requests would be needlessly duplicative and wasteful. *Id.*

<sup>149</sup> FED. R. CIV. P. 11(c)(1)(A).

<sup>150</sup> See, e.g., *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000) (affirming the district court’s denial of defendants’ Rule 11 motion when defendants served opposing counsel with the motion either on the day they filed their sanctions motion or shortly before; in either event, defendants “failed to comply with the twenty-one day rule”); *Cobleigh v. United States*, No. 97-2302, 1999 WL 195738 (6th Cir. Mar. 23, 1999) (reversing district court’s decision to grant defendant’s Rule 11 motion for failure to comply with the safe harbor provision stating that “[t]his court has held that the safe harbor provision is an absolute requirement and that, unless the movant has complied with the twenty-one day safe harbor service, the motion for sanctions shall not be filed with or presented to the court”) (footnote and quotation marks omitted); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir.

In *Radcliffe v. Rainbow Construction Co.*,<sup>151</sup> for example, the federal district court for the Northern District of California granted defendant's motion for Rule 11 sanctions and awarded \$75,000 in attorneys' fees despite the fact that defendant filed its Rule 11 motion as part of its motion for summary judgment and failed to serve plaintiffs with the motion twenty-one days prior to filing it with the court.<sup>152</sup> The Ninth Circuit reversed, stating that, because defendant "did not comply with the twenty-one day advance service provision[. . .] [defendant] was not entitled to obtain an award from plaintiffs."<sup>153</sup> In so holding, the Ninth Circuit rejected the district court's conclusion that a "'literal application of the safe harbor provision' was unnecessary" because plaintiffs had been given more than three months between the time the defendant's Rule 11 motion was filed and the court's order imposing sanctions was entered to withdraw the challenged contention.<sup>154</sup> According to the Ninth Circuit, "the procedural requirements of Rule 11(c)(1)(A)'s 'safe harbor' are mandatory."<sup>155</sup> Thus, "the fact that the plaintiffs had advance warning that [defendant] objected to their conspiracy allegation did not cure [defendant's] failure to comply with the strict procedural

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1995) (holding that the district court's order imposing Rule 11 sanctions could not be upheld on appeal when plaintiffs failed to comply with the safe harbor provision because plaintiffs did not serve their Rule 11 motion on defendants and their counsel prior to filing); *accord* *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (reversing the district court's order granting defendant's Rule 11 motion because of defendant's failure to comply with Rule 11's separate motion and safe harbor provisions); *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1058 (7th Cir. 1998) (defendants conceded that Rule 11 sanctions were improper where they had failed to comply with the separate motion and safe harbor provisions of Rule 11); *Bernstein v. Remer*, No. 96-2232, 1997 WL 685369, at \*1 (6th Cir. Oct. 29, 1997); *Ridder*, 109 F.3d at 296.

<sup>151</sup> 254 F.3d 772 (9th Cir. 2001).

<sup>152</sup> *Id.* at 788.

<sup>153</sup> *Id.* at 789 (the Ninth Circuit did not address the merits of the district court's order).

<sup>154</sup> *Id.*

The court decided that because [defendant] had filed a Rule 11 motion in response to the plaintiff's [sic] first amended complaint, and three months had passed between the motion and the court's order concerning sanctions, the plaintiffs and their attorneys had been given adequate notice and opportunity to withdraw the challenged allegation. As a result, the court ruled that Rule 11(c)(1)(A)'s 'safe harbor' provision had been satisfied, notwithstanding the lack of advance service on the plaintiffs.

*Id.*

<sup>155</sup> *Id.* at 788 (citing *Barber*, 146 F.3d at 710-11).



requirement of Rule 11(c)(1)(A)."<sup>156</sup> The Ninth Circuit had no trouble concluding that "[t]he district court abused its discretion when it concluded otherwise."<sup>157</sup>

The Seventh and Ninth Circuits, however, are not always consistent in their interpretations of the safe harbor provision. In *Flanagan v. Arnaiz*,<sup>158</sup> the Ninth Circuit upheld Rule 11 sanctions imposed on plaintiffs by the district court even though defendants had not complied with the safe harbor provision.<sup>159</sup> The court apparently rejected plaintiffs' safe harbor argument on appeal because "the district judge gave [plaintiffs] twenty-one days to withdraw from their meritless position."<sup>160</sup> Despite this clear irregularity in Rule 11's procedural requirements, the Ninth Circuit held that there was no abuse of discretion by the district court.<sup>161</sup>

In a particularly troubling opinion, the Seventh Circuit also upheld sanctions imposed pursuant to a motion despite the fact that the safe harbor provision was not complied with.<sup>162</sup> In *Divane v. Krull Electric Co.*,<sup>163</sup> the trustees of an employee benefit fund sued defendant electric company after defendant stopped making required contributions to the employee benefit plan.<sup>164</sup> Defendant filed an answer and counterclaim alleging that, since it was no longer a signatory to the collective bargaining agreement at issue, the suit violated the Labor Management Relations Act.<sup>165</sup> Defendant's answer to plaintiffs' complaint refused to

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Nos. 97-15517, 97-15518, 1999 WL 1128641 (9th Cir. Dec. 7, 1999).

<sup>159</sup> *Id.* at \*2.

<sup>160</sup> *Id.* (emphasis added). The *Flanagan* opinion is not only unpublished, it is also very short and lacking in detail. But three significant facts can be deduced from the fact that it was the district judge who provided plaintiffs with the twenty-one day safe harbor period: (1) this case did not involve an order imposing sanctions entered on the court's own initiative, as a safe harbor period is not required when the court acts pursuant to an order to show cause; (2) defendants, therefore, must have filed a Rule 11 motion; and (3) defendants did not provide plaintiffs with the required twenty-one day safe harbor period prior to filing their motion with the court because, if they had, the district court would not have needed to intercede. See FED. R. CIV. P. 11(c)(1)(B); see also *supra* text accompanying notes 85-88 (discussing sanctions imposed on court's initiative).

<sup>161</sup> *Id.*

<sup>162</sup> See *Divane v. Krull Electric Co.*, 200 F.3d 1020 (7th Cir. 1999).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1023.

<sup>165</sup> *Id.*

admit several statements that defendant had previously admitted in the companion litigation.<sup>166</sup> On September 13, 1996, plaintiffs sent defendant's counsel a Rule 11 motion requesting that he withdraw the counterclaim or correct the answer by October 4, 1996, pursuant to Rule 11(c)(1)(A).<sup>167</sup> When defendant failed to comply with either option, plaintiffs filed a motion to dismiss on October 17, 1996, in which they requested that the court strike defendant's answer and enter sanctions against defendant's counsel for \$500.<sup>168</sup> The district court denied the motion.<sup>169</sup> After trial ended in plaintiffs' favor several months later, plaintiffs filed a second motion for Rule 11 sanctions.<sup>170</sup> The motion was served and filed on the same day.<sup>171</sup> Three months after filing, the district court entered an order imposing sanctions against defendant's counsel requiring him to pay attorneys' fees of \$33,292 to plaintiffs, which constituted all of the attorneys' fees incurred by plaintiffs in the litigation, and \$2,306.69 to the court.<sup>172</sup>

On appeal, the sanctioned attorney argued, among other things, that plaintiffs' Rule 11 motion failed to comply with the safe harbor provision—the motion was not served on defendant twenty-one days prior to filing.<sup>173</sup> The district court had concluded that compliance with the safe harbor provision was not needed in this case because the Rule 11 motion was filed after the case was concluded at trial, and, therefore, there was no way that defendant or its counsel could have withdrawn its pleadings at that point.<sup>174</sup> The Seventh Circuit disagreed. The safe harbor provision, according to the appellate court, was not an empty

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1023-24. There is absolutely no indication in the opinion that plaintiffs actually filed a separate Rule 11 motion. Instead, it appears that plaintiffs merely included a request for sanctions as part of their motion to dismiss. *See id.*

<sup>169</sup> *Id.* at 1024.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The district court originally ordered defendant's attorney to pay \$40,171.07 in attorneys' fees and \$5,000 to the court. *Id.* The district court subsequently amended the sanctions pursuant to defense counsel's motion for reconsideration. *Id.* The district court also held, however, that if defendant satisfied the entire judgment against it, defendant's counsel would only be required to pay \$2,306.69 into the court. *Id.* By imposing sanctions in this fashion, it appears that the district court created a conflict of interest between the attorney and his client because the attorney's potential out-of-pocket liability was conditioned on whether his client paid the judgment against it. *Id.*

<sup>173</sup> *Id.* at 1025.

<sup>174</sup> *Id.* at 1026.

formality.<sup>175</sup> The court found, however, that the provision was satisfied in the instant case by taking notice of plaintiffs' September 1996, Rule 11 motion, which had been served on defense counsel more than twenty-one days prior to final judgment.<sup>176</sup>

According to the appellate court, at the hearing on plaintiffs' motion to dismiss and for sanctions, the district court had denied the motion after concluding that defendant's counterclaim raised questions of fact; the motion was, therefore, premature.<sup>177</sup> The Seventh Circuit interpreted this action by the district court as effectively extending the safe harbor for defendant and its counsel until trial, notwithstanding the fact that the only motion for sanctions that appears to have been filed by plaintiffs prior to final judgment was the one included with their motion to dismiss, which violates Rule 11's separate motion requirement and which was denied by the district court on October 17, 1996.<sup>178</sup> By interpreting the district court's action in this fashion, the Seventh Circuit was able to conclude that plaintiffs had effectively complied with the twenty-one day safe harbor provision.<sup>179</sup> The court, therefore, affirmed the imposition of sanctions but vacated the amount of the sanctions imposed by the district court.<sup>180</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* Here again, the Seventh Circuit makes no mention of whether the separate Rule 11 motion that was served on defense counsel was actually filed in court. *Id.* Instead, the court simply took "notice of the September 1996, service on [defense counsel] by [plaintiffs]." *Id.* This reinforces the conclusion that plaintiffs never filed a separate Rule 11 motion with the district court.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1026-27.

<sup>179</sup> *Id.* at 1027.

We find that [plaintiffs] effectively complied with the twenty-one day safe harbor provision of Rule 11(c)(1)(A), and the dismissal of [plaintiffs'] initial motion to sanction [defense counsel] as premature did not extinguish this effective notice. Therefore the district court did not abuse its discretion in granting [plaintiffs'] motion for sanctions

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*Id.*

<sup>180</sup> *Id.* The Seventh Circuit "reject[ed] the [district court's] blanket award of fees." *Id.* at 1030. The appellate court was unable to "accept the [district] court's suggestion that all [plaintiffs'] legal expenses were costs directly resulting from [defense counsel's] sanctionable activities." *Id.* The court, therefore, remanded the case to the district court to determine which portion of plaintiffs' legal costs were the direct result of the sanctionable conduct. *Id.* at 1031.

Research revealed very little case law in the Third Circuit addressing the safe harbor provision. The one case discovered, however, suggests that strict compliance with the provision is not required.<sup>181</sup> In *Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania*,<sup>182</sup> plaintiff sued defendant for copyright infringement.<sup>183</sup> On June 19, 1995, defendant filed a motion to dismiss.<sup>184</sup> While its motion to dismiss was pending, defendant mailed plaintiff's counsel a notice of its intention to move for sanctions under Rule 11.<sup>185</sup> The district court subsequently granted the motion to dismiss. On September 15, 1995, defendant filed its motion for Rule 11 sanctions.<sup>186</sup> On November 1, 1995, the district court also issued an order to show cause why Rule 11 sanctions "should not be imposed for (a) filing the complaint, and failing to withdraw it; and (b) signing and filing each and every document presented."<sup>187</sup> On February 1, 1996, the district court granted defendant's motion for Rule 11 sanctions and held plaintiff and his counsel jointly and severally liable for \$15,000 in attorneys' fees payable to the defendant.<sup>188</sup>

On appeal, plaintiff's counsel argued that the Rule 11 sanctions were improperly imposed.<sup>189</sup> More specifically, he argued that he was not given the benefit of the safe harbor provision because the complaint was dismissed before he had had a full opportunity, i.e., twenty-one days, to withdraw it.<sup>190</sup> Defendant countered that the Rule 11 sanctions were actually imposed on the court's own initiative, i.e., pursuant to the

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<sup>181</sup> On August 28, 2001, two additional searches of the Third Circuit database (CTA3) on Westlaw were conducted specifically because only one safe harbor case was uncovered in that circuit. The specific searches were as follows: (1) "FRCP 11" "Rule 11" /p "safe harbor" & DA(AFT 11/30/1993); and (2) "FRCP 11(c)(1)(A)" "Rule 11(c)(1)(A)" & DA(AFT 11/30/1993). Both searches produced a single opinion, namely, *Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania*, 103 F.3d 294 (3d Cir. 1996).

<sup>182</sup> 103 F.3d 294.

<sup>183</sup> *Id.* at 296.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* The opinion refers to some form of "notice" being sent to plaintiff's counsel. Thus it is not clear if a separate Rule 11 motion was served on plaintiff's counsel.

<sup>186</sup> *Id.* Defendant also filed a motion for attorneys' fees under 17 U.S.C. § 505 of the Copyright Act and for sanctions pursuant to 28 U.S.C. § 1927. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 297.

<sup>189</sup> Plaintiff had settled his liability with defendant, paying \$6,250, leaving plaintiff's counsel liable for \$8,750. *Id.*

<sup>190</sup> *Id.*

district court's order to show cause,<sup>191</sup> and, therefore, no safe harbor was required.<sup>192</sup> At oral argument, plaintiff's counsel apparently acknowledged that he would not have withdrawn the complaint even if he had been provided with the full twenty-one day safe harbor period.<sup>193</sup> As a result of this concession, the Third Circuit held that it did not need to address plaintiff's counsel's safe harbor argument.<sup>194</sup>

The *Zuk* opinion is troubling because the Third Circuit appeared willing to, and in fact did, overlook the procedural defects in defendant's Rule 11 motion, specifically, the apparent failure to comply with either the separate motion requirement or the safe harbor provision. Therefore, the *Zuk* opinion seems to imply that the safe harbor provision is not an absolute requirement precluding a party from filing and being awarded sanctions upon a Rule 11 motion if the non-moving party later admits that it would not have withdrawn the challenged contention within the safe harbor period.

The problem, however, is that Rule 11(c)(1)(A) explicitly requires the moving party both to serve a separate Rule 11 motion and to wait twenty-one days prior to filing it with the court, unless a shorter time period is ordered by the court.<sup>195</sup> It does not provide that the non-moving party is only entitled to the benefit and protection of the safe harbor provision if she actually takes advantage of it. Clearly, if the non-moving party takes advantage of the safe harbor period, there would not be a problem at all; the challenged contention would be withdrawn or amended. A Rule 11 problem only exists where the non-moving party

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<sup>191</sup> The Third Circuit noted, however, that "[t]he district court issued an order to show cause, which is required only under 11(c)(1)(B), but stated that it was 'in consideration of defendant's motion for sanctions.' In its accompanying memorandum, the district court did not address this apparent inconsistency." *Id.* Of course, the problem with the defendant's argument that the Rule 11 sanctions were imposed via an order to show cause is that the sanction imposed, i.e., attorneys' fees, is not authorized under Rule 11 when the district court acts on its own initiative. See *supra* notes 96-99 and accompanying text.

<sup>192</sup> *Zuk*, 103 F.3d at 299 n.3. Unfortunately, the *Zuk* opinion fails to provide a couple of critical dates. Specifically, it does not disclose: (1) when defendant's "notice" to plaintiff's counsel was sent; or (2) when the district court granted defendant's motion to dismiss. Consequently, it is impossible to determine how much time, if any, plaintiff was given to withdraw or correct his complaint prior to dismissal of the action. Based on the parties' arguments on appeal, however, it seems clear that plaintiff was not given the benefit of a full twenty-one days prior to dismissal.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> FED. R. CIV. P. 11(c)(1)(A).

does not take advantage of the safe harbor period. Even this statement of the problem assumes in the first instance, however, that a safe harbor was actually provided. The question, therefore, is whether failure to comply with the safe harbor provision should be excused completely, thereby authorizing Rule 11 sanctions to be imposed upon motion by a party, where the non-moving party later admits that she would not have withdrawn the challenged contention within the safe harbor period. The Third Circuit in *Zuk* answered this question affirmatively. Based on the explicit language of Rule 11, however, the question should have been answered in the negative; any other interpretation would severely undercut the effectiveness of the safe harbor provision.

### c. Timing

Given that the safe harbor provision requires that the non-moving party be given twenty-one days to correct or withdraw the challenged contention, determining *when* a Rule 11 motion has to be served and filed is critical. Can the moving party wait until after final disposition of the case to pursue Rule 11 sanctions? The Third, Fifth, Sixth, and Ninth Circuits have all answered this question in the negative.<sup>196</sup>

In *Ridder v. City of Springfield*,<sup>197</sup> for example, plaintiff filed a civil rights action against the City of Springfield and individual defendants.<sup>198</sup> After discovery was concluded, the City moved for summary judgment.<sup>199</sup> On February 28, 1995, the magistrate judge dismissed all of plaintiff's claims against all of the defendants.<sup>200</sup> On March 28, 1995, the City moved for attorneys' fees and/or sanctions pursuant to several

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<sup>196</sup> See, e.g., *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000). In *Tompkins*, the Fifth Circuit affirmed the district court's denial of defendants' Rule 11 motions for two reasons. *Id.* at 788. First, defendants did not file their motions until after trial had concluded, and, second, they failed to provide plaintiffs with the twenty-one day safe harbor by serving the Rule 11 motions either on the same day they were filed or shortly before. *Id.* As a result, defendants, according to the Fifth Circuit, "den[ie]d the [plaintiffs] a reasonable opportunity to correct their complaint." *Id.* Therefore, the Fifth Circuit held that the district court appropriately denied the Rule 11 sanctions. *Id.*

<sup>197</sup> 109 F.3d 288 (6th Cir. 1997).

<sup>198</sup> *Id.* at 290. Plaintiff filed a claim pursuant to 42 U.S.C. § 1983 against the defendants stemming from his arrest and pre-trial incarceration for rape and related charges. *Id.* DNA tests later exonerated plaintiff and all charges were dropped. *Id.* at 291.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

different sanctioning provisions, including Rule 11.<sup>201</sup> On October 11, 1995, the magistrate judge granted the City's motion for Rule 11 sanctions and ordered plaintiff's counsel to pay the City \$32,546.02 in attorneys' fees.<sup>202</sup> Rule 11 sanctions were imposed notwithstanding defendant's failure to comply with the safe harbor provision.<sup>203</sup>

On appeal, the Sixth Circuit was called upon to "determine the propriety of sanctions under [Rule 11] as amended in 1993, when a motion for sanctions is filed without satisfying the requisite 'safe harbor' period and after a court has entered summary judgment."<sup>204</sup> The Sixth Circuit held, first, that a Rule 11 motion filed after final disposition of a case is not timely and, second, that the safe harbor provision is an absolute requirement that must be satisfied before sanctions can be awarded upon a motion.<sup>205</sup>

With respect to the first issue, the court acknowledged that the text of Rule 11 did not specify when a motion should be brought.<sup>206</sup> The court specifically recognized, however, that "[b]y virtue of the fact that under the 1993 amendments, 'a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn,' . . . it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed."<sup>207</sup> As a result, the Sixth Circuit concluded,

A party must now serve a Rule 11 motion on the allegedly offending party at least twenty-one days prior to conclusion of the case or judicial rejection of the offending contention. If the court disposes of the offending contention before the twenty-one day (safe harbor) period expires, a motion for sanctions cannot be filed with or presented to the court. Any other

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<sup>201</sup> *Id.* The City also moved for sanctions under 42 U.S.C. § 1988 and 28 U.S.C. § 1927. *Id.* at 291-92.

<sup>202</sup> *Id.* at 292. The district court also granted the City's motion pursuant to 28 U.S.C. § 1927. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 295.

<sup>205</sup> *Id.* at 295-97.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (citation omitted).

interpretation would defeat the rule's explicit requirements.<sup>208</sup>

In the *Ridder* case, there was no question that the City failed to comply with the safe harbor provision.<sup>209</sup> The City argued, however, that compliance with the safe harbor provision should be excused in this case because it would have been "a vain act;" plaintiff's counsel had made it abundantly clear throughout the litigation that he did not intend to withdraw his claims against the City.<sup>210</sup> The Sixth Circuit disagreed, holding that the safe harbor provision was an absolute requirement and that the City's failure to comply with it meant that its Rule 11 motion should not have been filed with the court.<sup>211</sup>

Notwithstanding the fact that the safe harbor provision was mandatory, the magistrate judge who imposed Rule 11 sanctions found, and the City argued on appeal, that insisting on the safe harbor provision was "'an empty formality' when a motion for sanctions comes after summary judgment has been granted."<sup>212</sup> The Sixth Circuit agreed, stating that "[b]y virtue of its nature, the 'safe harbor' provision cannot have any effect if the court has already rendered its judgment in the case; it is too late for the offending party to withdraw the challenged claim."<sup>213</sup> Rather than excusing the City's noncompliance with the safe harbor provision, however, which was the conclusion argued for by the City, the court held that the City had "given up the opportunity to receive an award of Rule 11 sanctions in this case by waiting to file the motion until after the entry of summary judgment."<sup>214</sup> The Sixth Circuit reasoned,

A party seeking sanctions must leave sufficient opportunity for the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention. Pragmatic

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<sup>208</sup> *Id.* (citations omitted). A district court would be permitted, however, to defer its ruling on the sanctions motion until after the final disposition of the case. *Id.* In other words, the motion must be filed prior to final disposition but need not be decided until after final resolution of the case. *Id.*

<sup>209</sup> *Id.* Counsel for the City admitted that "it did not serve the motion for sanctions on *Ridder's* counsel prior to filing the motion with the court . . . ." *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 296-97.

<sup>214</sup> *Id.* at 297.



realities require such strict adherence to the rule's outlined procedure. By delaying the motion until after summary judgment was granted, [the City] deprived [plaintiff's] counsel of the "safe harbor" to which the rule says he is entitled.<sup>215</sup>

The appellate court thus held that Rule 11 sanctions are unavailable "unless the motion for sanctions is served on the opposing party for the full twenty-one day 'safe harbor' period before it is filed with or presented to the court."<sup>216</sup> Significantly, the court went on to state that "this service *and* filing must occur prior to final judgment or judicial rejection of the offending contention."<sup>217</sup>

The Ninth Circuit has adopted a similar approach. In *Barber v. Miller*,<sup>218</sup> the plaintiff filed a forty-page complaint against several defendants alleging, among other things, patent infringement, notwithstanding the fact that the plaintiff did not own the patent at issue.<sup>219</sup> The defendant's counsel gave the plaintiff repeated notice via phone calls and letters of the deficiency and of his client's intent to seek Rule 11 sanctions unless the complaint was dismissed.<sup>220</sup> The defendant eventually filed a motion to dismiss the patent claim in which it included a request for Rule 11 sanctions.<sup>221</sup> Almost three months after the district court granted the defendant's motion to dismiss with prejudice, the defendant moved for sanctions under Rule 11 and served plaintiff's attorney with the motion.<sup>222</sup> Approximately three months later, the district court awarded the defendant \$2,500 in sanctions against the

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<sup>215</sup> *Id.* The court also cautioned against using hindsight to decide Rule 11 motions by stating that "neither the opposing party nor the magistrate judge should, with hindsight, step into the attorney's shoes to speculate as to whether the prospect of a fine or other sanctions would have sufficiently motivated the attorney to withdraw the offense." *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (emphasis added); see also *Bernstein v. Remer*, No. 96-2232, 1997 WL 685369, at \*1 (6th Cir. Oct. 29, 1997) (vacating the district court's order granting the defendant's Rule 11 motion where defendant served and filed its Rule 11 motion on the same day and after the case was dismissed); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 384 (6th Cir. 1997) (affirming denial of defendants' Rule 11 motion because defendants failed to timely file their motion, waiting until after trial and verdict to serve and file the motion).

<sup>218</sup> 146 F.3d 707 (9th Cir. 1998).

<sup>219</sup> *Id.* at 709.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* The district court granted the defendant's motion to dismiss on October 16, 1995. *Id.* On January 19, 1996, defendant filed and served its sanctions motion. *Id.*

plaintiff's attorney.<sup>223</sup> The district court concluded that complying with the safe harbor provision in this case "would have been futile, because the offending complaint had already been dismissed."<sup>224</sup> The district court also noted that the Rule 11 motion was in fact filed and served more than twenty-one days prior to the deadline for filing.<sup>225</sup> Defendant's only error with respect to the safe harbor provision, therefore, was in filing its motion with the court too soon, "not by serving it on Plaintiff too late."<sup>226</sup>

The Ninth Circuit reversed. The appellate court had no doubt that Rule 11 had been violated.<sup>227</sup> The problem with the district court's order, however, was twofold. First, the defendant did not follow the procedures required by Rule 11(c)(1)(A), namely, the separate motion and safe harbor provisions, to be awarded sanctions upon its motion.<sup>228</sup> Second, by filing its motion after the complaint had been dismissed, the defendant deprived the plaintiff of the protection specifically afforded him by the safe harbor provision.<sup>229</sup> According to the Ninth Circuit, the purpose of the safe harbor provision is to give the non-moving party an opportunity to withdraw or correct a challenged pleading and thereby escape sanctions entirely.<sup>230</sup> Hence, a Rule 11 motion served after dismissal of the complaint deprived the plaintiff of that opportunity.<sup>231</sup> Because the plaintiff was not given the opportunity to respond to the defendant's motion by withdrawing his claim, which would have completely immunized him against sanctions, the purpose of the safe harbor provision was entirely defeated.<sup>232</sup> The Ninth Circuit thus held that, "[i]n light of the clear language and intent of the amended Rule, we agree with the Sixth Circuit that 'a party cannot wait until after summary judgment to move for sanctions under Rule 11.'"<sup>233</sup>

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 710.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 711.

<sup>228</sup> *Id.* at 710.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* The Ninth Circuit also held that informal warnings, such as the phone calls and letters, were not sufficient to trigger the safe harbor provision. *Id.*

<sup>233</sup> *Id.* at 711 (quoting *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997)); accord *Madamba v. Certified Grocers Cal., Ltd.*, No. 97-15017, 1998 WL 339685, at \*2 (9th Cir. May

The Third Circuit has gone so far as to adopt a supervisory rule applicable to all courts in that circuit, which requires "that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment."<sup>234</sup> According to the Third Circuit, this approach to Rule 11 motions "serves the interest of judicial economy without risking a significant waste of district court efforts."<sup>235</sup> The Third Circuit has adhered to its supervisory rule and has reversed Rule 11 sanctions where the motions were untimely filed.<sup>236</sup>

At the same time, the supervisory rule was first adopted by the Third Circuit with respect to the 1983 version of Rule 11, and most of the cases in which it has been applied deal with the old Rule.<sup>237</sup> A 1999 decision by the Third Circuit, however, makes clear that the supervisory rule adopted in 1988 has been valid and applicable to all Rule 11 cases.<sup>238</sup>

7, 1998) (holding that, because defendant "delayed service of the Rule 11 motion until after its summary judgment motion had been filed, and delayed filing of the Rule 11 motion until after final judgment had been entered, the district court did not abuse its discretion in determining that the motion for sanctions was untimely").

<sup>234</sup> *MaryAnn Pensiero, Inc. v. Lingle*, 847 F.2d 90, 100 (3d Cir. 1988). Indeed, the Third Circuit went on to say that, "[w]here appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation." *Id.*

<sup>235</sup> *Id.* at 99. According to the Third Circuit,

Rather than misusing scarce resources, timely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter. Similarly, concurrent consideration of challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions.

*Id.* (citation omitted).

<sup>236</sup> See, e.g., *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs.*, 951 F.2d 1399, 1413 (3d Cir. 1991); *Hilmon Co. v. Hyatt Int'l*, 899 F.2d 250, 251 n.1 (3d Cir. 1990); *Pensiero*, 847 F.2d at 92.

<sup>237</sup> See *supra* notes 234-36 and accompanying text.

<sup>238</sup> See *Prosser v. Prosser*, 186 F.3d 403 (3d Cir. 1999). The Third Circuit extended the *Pensiero* supervisory rule to sua sponte Rule 11 sanctions. *Id.* at 405 (citing *Simmerman v. Corino*, 27 F.3d 58, 63 (3d Cir. 1994)). In explaining its reasoning, the court stated,

Our precedent concerning Rule 11 sanctions helps guide our review here. In *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 92 (3d Cir. 1988), we adopted a supervisory rule requiring parties to file all motions for Rule 11 sanctions before entry of the court's final order . . . . We extended this rule [in 1994] to apply to courts considering Rule 11 sanctions in *Simmerman v. Corino*, 27 F.3d 58 (3d Cir. 1994).

Notwithstanding the foregoing, the Third Circuit has affirmed Rule 11 sanctions imposed by motions filed after final judgment. In *Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania*,<sup>239</sup> defendant filed its Rule 11 motion after its motion to dismiss was granted.<sup>240</sup> Almost five months later, the district court awarded defendant \$15,000 in attorneys' fees, to be paid jointly and severally by the plaintiff and his counsel.<sup>241</sup> On appeal, the Third Circuit upheld the imposition of Rule 11 sanctions.<sup>242</sup> It vacated the type and amount of sanctions imposed,<sup>243</sup> however, and remanded the case to the district court for further proceedings.<sup>244</sup> Because it was remanding the case, the Third Circuit spent some time in the opinion addressing issues that it was certain would arise in the court below.<sup>245</sup> Notably, no mention was ever made of the Third Circuit's supervisory rule.

The Sixth Circuit has similarly contradicted itself with respect to the propriety of post-judgment Rule 11 motions. In *Barker v. Bank One, Lexington, N.A.*,<sup>246</sup> the district court dismissed the complaint against some of the forty defendants sued by plaintiff, and, on April 11, 1996, final judgment was entered.<sup>247</sup> On May 9, 1996, defendants served plaintiff with their Rule 11 motion.<sup>248</sup> The motion was subsequently filed on May 31, 1996.<sup>249</sup> On April 29, 1997, the district court granted defendants' motion and ordered plaintiff and his counsel jointly to pay

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*Id.* The Third Circuit thus takes it as an established fact that the supervisory rule has existed since 1988 and seems to assume that it has been applicable to Rule 11 decisions in that circuit since that time. *Id.*

<sup>239</sup> 103 F.3d 294 (3d Cir. 1996).

<sup>240</sup> *Id.* at 296.

<sup>241</sup> *Id.* at 297.

<sup>242</sup> *Id.* at 301.

<sup>243</sup> *Id.* The court found "no error in the district court's imposition of fee sanctions upon the appellant" but concluded that "the amount may be contrary to the current spirit of Rule 11." *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* The issues that the court focused on consisted of the "proper type and amount of sanctions to be imposed pursuant to Rule 11 under the particular circumstances of the case." *Id.* at 298.

<sup>246</sup> No. 96-1199, 1998 WL 466437 (6th Cir. July 30, 1998).

<sup>247</sup> *Id.* at \*1.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

defendants \$15,726.75 in attorneys' fees and ordered plaintiff to pay defendants an additional \$12,914.05 in fees.<sup>250</sup>

The Sixth Circuit affirmed the Rule 11 sanctions on appeal in spite of plaintiff's argument that the sanctions were improperly granted because defendants had failed to comply with Rule 11's safe harbor provision by filing their motion after final judgment in violation of the *Ridder* case.<sup>251</sup> The panel of the Sixth Circuit that upheld the sanctions in *Barker* acknowledged, first, that the purpose of the safe harbor provision was to enable a party or its counsel to avoid sanctions by taking appropriate corrective action and, second, that another panel of the Sixth Circuit<sup>252</sup> had previously held in *Ridder* that "service must occur at least 21 days before final judgment, otherwise the opportunity to invoke the safe harbor is lost."<sup>253</sup> According to the *Barker* court, however, the two cases were distinguishable because, in *Barker*, defendants had sent plaintiff warning letters several months before the case was dismissed.<sup>254</sup> The plaintiff in *Barker*, therefore, unlike the plaintiff in *Ridder*, actually received advance warning that Rule 11 sanctions would be sought and was given ample time to correct the alleged violation.<sup>255</sup> The court also seemed to be swayed by the fact that defendants' post-judgment Rule 11 motion was served on plaintiff twenty-one days prior to filing.<sup>256</sup>

Unfortunately, there are several obvious problems with the *Barker* court's holding and reasoning. First, the pre-dismissal warning letters did not satisfy Rule 11's separate motion requirement and, hence, did not trigger the safe harbor period prior to final judgment. Second, *Barker* clearly contradicts *Ridder*, despite the *Barker* court's attempt to distinguish the two cases. By serving and filing their Rule 11 motion after final judgment was entered, defendants deprived plaintiff of any meaningful opportunity to correct the alleged Rule 11 violation and

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at \*1-2.

<sup>252</sup> The panel that decided the *Ridder* case included Circuit Judges Suhrheinrich and Moore, and District Court Judge McKinley. See *Ridder v. City of Springfield*, 109 F.3d 288, 290 (6th Cir. 1997). The *Barker* panel included Circuit Judges Suhrheinrich and Daughtrey, and District Court Judge McKeague. See *Barker*, 1998 WL 466437, at \*1. Circuit Judge Moore, who was not present on the *Barker* panel, authored the *Ridder* decision. *Ridder*, 109 F.3d at 290.

<sup>253</sup> *Barker*, 1998 WL 466437, at \*2 (citing *Ridder*, 109 F.3d at 294).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

thereby avoid sanctions, which is exactly what *Ridder* had held violated the safe harbor provision of the Rule. Consequently, instead of correcting the procedural errors in the case, the *Barker* court compounded them.

But what happens if a Rule 11 motion is served twenty-one days prior to final judgment but is not actually filed with the court until after the conclusion of the case? According to the Third Circuit's supervisory rule<sup>257</sup> and the Sixth Circuit in *Ridder*,<sup>258</sup> such a motion would still be deemed untimely and Rule 11 sanctions would be precluded. A panel of the Sixth Circuit, however, answered the question differently and affirmed the imposition of Rule 11 sanctions in an unpublished decision.<sup>259</sup>

In *Powell v. Squire, Sanders & Dempsey*,<sup>260</sup> plaintiff filed her complaint in federal district court on April 2, 1997, stating claims for malicious prosecution and abuse of process.<sup>261</sup> On July 2, 1997, defendant moved for judgment on the pleadings.<sup>262</sup> On the same day, counsel for the defendant sent plaintiff's counsel a letter requesting that he voluntarily withdraw the complaint.<sup>263</sup> Served with the letter was a copy of defendant's Rule 11 motion.<sup>264</sup> Plaintiff did not withdraw her complaint, and, on October 29, 1997, the district court granted defendant's motion for judgment on the pleadings.<sup>265</sup> On November 12, 1997, defendant filed its Rule 11 motion in court.<sup>266</sup> The district court subsequently granted defendant's motion and ordered plaintiff's counsel to pay \$1,000 to defendant and \$10,000 to the Clients Security Fund of Ohio.<sup>267</sup> The

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<sup>257</sup> See *supra* notes 234-38 and accompanying text.

<sup>258</sup> See *Ridder*, 109 F.3d at 288; see also *supra* text accompanying notes 197-217.

<sup>259</sup> The panel that decided the case referenced here consisted of Circuit Judges Krupansky, Ryan, and Suhrheinrich. See *Powell v. Squire, Sanders & Dempsey*, Nos. 98-3668, 98-3670, 1999 WL 519186 (6th Cir. July 16, 1999). Interestingly, Circuit Judge Suhrheinrich participated in the decisions in *Ridder*, *Barker*, and *Powell*. He apparently agreed with the holding and reasoning in each of these cases as he did not file dissenting opinions in any of them.

<sup>260</sup> Nos. 98-3668, 98-3670, 1999 WL 519186 (6th Cir. July 16, 1999).

<sup>261</sup> *Id.* at \*1.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at \*1-2.

<sup>267</sup> *Id.* at \*2.

latter sanction never had to be paid, however, if certain conditions were met.<sup>268</sup>

On appeal, the sanctioned attorney based his argument on the *Ridder* case.<sup>269</sup> More specifically, he argued that sanctions were improper under *Ridder* because defendant waited to file its Rule 11 motion until after final judgment was entered in its favor.<sup>270</sup> While the *Powell* court acknowledged that the *Ridder* opinion included language stating that a Rule 11 motion must be filed prior to final judgment, the court held that that particular language in the opinion was dicta and, therefore, not binding on subsequent panels of the Sixth Circuit.<sup>271</sup> Consequently, because defendant's Rule 11 motion was served more than twenty-one days prior to filing and the service occurred prior to final judgment, the court held that the safe harbor provision had been complied with<sup>272</sup> and the imposition of sanctions was proper.<sup>273</sup>

The *Powell* court's determination that the language in *Ridder* requiring pre-judgment filing of Rule 11 motions was dicta is debatable and problematic. The statement is problematic because if the *Powell* court's interpretation of *Ridder* is correct, at least with respect to when a Rule 11 motion should be filed, then its "dicta" argument would (or should, to be consistent) also apply to the language in *Ridder* that

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<sup>268</sup> *Id.* The district court suspended payment of the sanction to the Security Fund on condition that plaintiff's attorney "obtain a written opinion from a member of the Columbus Bar Association before taking action to depose a lawyer representing a client, or filing an action sounding in malicious prosecution or abuse of process against a lawyer based on the lawyer's representation of a client." *Id.*

<sup>269</sup> *Id.* at \*2-3.

<sup>270</sup> *Id.*

<sup>271</sup> According to the *Powell* court,

The determination in *Ridder* that the motion was required to be filed with the court prior to adjudication of the case was unnecessary because the defendant failed to comply with Rule 11 when it did not serve the motion on the plaintiff's counsel for the twenty-one day "safe harbor" period. Accordingly, to the extent that *Ridder* stands for such a proposition, it is dicta and not binding on this court.

*Id.* at \*3 (citations omitted).

<sup>272</sup> *Id.* at \*2.

<sup>273</sup> *Id.* at \*4. While the Sixth Circuit affirmed the imposition of Rule 11 sanctions, it vacated the portion of the district court's order requiring the sanctioned attorney to pay \$10,000 to the Clients Security Fund of Ohio, because, in essence, "the district court imposed a perpetual penalty on [the sanctioned attorney] that may impede the effective representation of future clients." *Id.*

required a Rule 11 motion to be served prior to entry of final judgment. The reason for this conclusion is simple. It is true that Rule 11 does not explicitly state *when* a Rule 11 motion must be *filed*; the Rule only provides that such a motion must be *served* twenty-one days prior to filing. But it is also true that there is no language in Rule 11 that explicitly requires that a Rule 11 motion be served *prior to final judgment* either. Nothing in the text of Rule 11, in other words, compels *either* of the positions taken by the Sixth Circuit in *Ridder*. Consequently, both positions, i.e., that a Rule 11 motion must be served *and* filed prior to final judgment, could arguably be deemed dicta if the *Powell* court's interpretation is correct; and this result, if *Ridder* is later interpreted in this fashion, is extremely problematic precisely because it would severely undercut the effectiveness of the safe harbor provision in reducing Rule 11's chilling effects.

The *Powell* court's decision to designate an important part of *Ridder* as dicta is also debatable for the same reason. Again, there is nothing in the explicit language of Rule 11 to compel *either* of the positions taken by the Sixth Circuit in *Ridder*. Yet, several federal circuit courts of appeals, including the Sixth Circuit, have so held.<sup>274</sup> And at least three circuits, again with the Sixth Circuit among them even after *Ridder*, have also interpreted Rule 11 to require that Rule 11 motions must be filed prior to final judgment.<sup>275</sup> Therefore, compelling policy considerations that seem to serve the purposes of the 1993 amendments, rather than the text of the Rule, appear to have motivated the Sixth Circuit and the other federal appellate courts deciding these issues to hold that a Rule 11 motion must be both served and filed prior to final judgment.<sup>276</sup> Consequently, a strong argument can be made that *Ridder's* language requiring a Rule 11 motion to be filed before the case is concluded is not dicta at all. Suffice it to say at this point that the *Powell* case definitely represents a lower threshold for imposing Rule 11 sanctions than that suggested by *Ridder*.<sup>277</sup>

Of the five circuits that have addressed the timing issue in some fashion, only the Seventh Circuit has consistently held that Rule 11 motions can be filed after the case has been concluded. In *Divane v.*

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<sup>274</sup> See *supra* text accompanying notes 197-217 (discussing the Sixth Circuit decisions).

<sup>275</sup> The three circuits are the Third, Sixth, and Ninth Circuits. See *supra* Part III.A.1.c.

<sup>276</sup> See *supra* text accompanying notes 197-238 (discussing the Sixth Circuit decisions).

<sup>277</sup> See *infra* Part IV.B.



*Krull Electric Co.*,<sup>278</sup> for example, the district court sanctioned defendant's attorney, pursuant to plaintiffs' Rule 11 motion, and ordered the attorney to pay \$33,292 to plaintiff in attorneys' fees and \$2,306.69 to the court.<sup>279</sup> Plaintiffs' Rule 11 motion was both served and filed after a bench trial ended in plaintiffs' favor.<sup>280</sup>

The sanctioned attorney argued on appeal that, "since the purpose of Rule 11(c)(1)(A) is to deter claimants from filing frivolous motions and pleadings, delaying the decision to allow motions for sanctions until after final judgment 'completely defeats the interests' that the Rule hopes to promote."<sup>281</sup> Once judgment is entered, the argument continued, "imposition of sanctions cannot affect the prior filing of motions, because parties have no opportunity to correct their sanctionable conduct."<sup>282</sup> The Seventh Circuit disagreed and declined to establish a set time period for filing Rule 11 motions because the Rule itself was silent on the matter.<sup>283</sup> Instead, the court decided to leave the timing of Rule 11 motions to the discretion of the district courts.<sup>284</sup>

In *Divane*, therefore, because the district court had concluded that "the lack of evidentiary support for defendant's counterclaim could not have been determined until trial was completed," the Seventh Circuit concluded that a post-judgment Rule 11 motion was appropriate.<sup>285</sup> In support of that conclusion, the Seventh Circuit reasoned that "the interest in deterring further frivolous post-judgment motions by the same litigants or in deterring future litigants may be promoted by a post-judgment request for sanctions."<sup>286</sup>

The problem, of course, is that *Divane* did not involve a post-judgment motion that was the subject of a Rule 11 motion.<sup>287</sup> Instead, the case involved a post-judgment Rule 11 motion based on pre-judgment

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<sup>278</sup> 200 F.3d 1020 (7th Cir. 1999).

<sup>279</sup> *Id.* at 1024.

<sup>280</sup> *Id.*; see also *supra* text accompanying notes 163-80 (discussing *Divane* and the safe harbor provision).

<sup>281</sup> *Divane*, 200 F.3d at 1025.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* ("Rule 11(c)(1)(A) does not specify any time period when a motion for sanctions must be filed, and we see no need to establish one.").

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* (internal quotation marks omitted).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

filings.<sup>288</sup> The Seventh Circuit's reasoning in support of the district court's order granting plaintiffs' post-judgment Rule 11 motion is, therefore, inapposite because it should go without saying that post-judgment motions can themselves be the target of a Rule 11 motion.<sup>289</sup> Nevertheless, the Seventh Circuit has continued to adhere to its position that requests for sanctions can be made following final judgment.<sup>290</sup>

#### d. Summary

Probably the most striking aspect of the federal appellate case law addressing Rule 11 motion practice is its inconsistency in terms of the interpretation and application of the 1993 procedural amendments. More specifically, there are *intercircuit* conflicts on all of the following issues: (1) warning letters and the separate motion requirement—the Second, Seventh, and Ninth Circuits take the position that a separate motion, not a warning letter, is required to trigger Rule 11's safe harbor provision; the Sixth Circuit has taken the position that a warning letter provides sufficient notice;<sup>291</sup> (2) the safe harbor provision—the Fifth, Sixth, Seventh, and Ninth Circuits have all strictly construed this provision as requiring compliance or the Rule 11 motion must be denied; the Third Circuit, however, does not appear to strictly construe this provision and, instead, has found substantial compliance to be sufficient;<sup>292</sup> (3) timing (service *and* filing after final judgment)—the Third, Fifth, Sixth, and Ninth Circuits have all held that a Rule 11 motion served and filed after a final judgment is entered in a case must be denied; the Seventh Circuit, on the other hand, makes no such hard and fast rule and has decided to allow the district courts to determine when a Rule 11 motion must be served and filed on a case-by-case basis;<sup>293</sup> (4) timing (service prior to but filing after final judgment)—here, the Third and Sixth Circuits have held that a Rule 11 motion must be both served and filed prior to final judgment or

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<sup>288</sup> *Id.*

<sup>289</sup> Even in that situation, however, Rule 11 sanctions can only be imposed if the procedural requirements of the Rule are satisfied.

<sup>290</sup> See, e.g., *In re Rimsat*, 212 F.3d 1039 (7th Cir. 2000) (citing *Divane* in support of its holding that the district court did not abuse its discretion by imposing sanctions pursuant to defendant's motion filed after the case had settled). In fact, based on the *Divane* opinion, the Seventh Circuit specifically rejected the Third Circuit's contrary approach to the issue. *Id.*

<sup>291</sup> See *supra* Part III.A.1.a.

<sup>292</sup> See *supra* Part III.A.1.b.

<sup>293</sup> See *supra* Part III.A.1.c.

it must be denied; again, the Seventh Circuit would leave the timing of a Rule 11 motion in the hands of the district courts.<sup>294</sup>

Significantly, however, there are also pronounced *intracircuit* conflicts, i.e., case law from one circuit actually contradicts cases from that same circuit with respect to the following procedural amendments: (1) the safe harbor provision—the Seventh and Ninth Circuits have held that substantial, rather than strict, compliance with the safe harbor provision is sufficient;<sup>295</sup> (2) timing (service and filing before final judgment)—the Third and Sixth Circuits have upheld district court decisions that imposed Rule 11 sanctions where the Rule 11 motion was not both served and filed prior to final judgment;<sup>296</sup> (3) timing (service before judgment, filing after final judgment)—the Sixth Circuit has affirmed a decision imposing Rule 11 sanctions where the Rule 11 motion was served prior to final judgment but not filed until afterwards.<sup>297</sup>

## 2. Rule 11 and Orders to Show Cause

A Rule 11 motion is not the only mechanism by which Rule 11 sanctions may be imposed. Such sanctions may also be imposed by a federal district court judge upon her own initiative. Unlike practice under the 1983 version of the Rule, however, the district court's substantial discretion is somewhat constrained by two significant limitations. First, before the district court judge may impose Rule 11 sanctions, she must issue an order to show cause. Second, even if the judge determines that Rule 11 sanctions are warranted, her authority to award monetary sanctions, particularly monetary sanctions in the form of attorneys' fees, is significantly curtailed.<sup>298</sup>

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<sup>294</sup> See *supra* Part III.A.1.c.

<sup>295</sup> Compare *supra* text accompanying notes 151-57, with *supra* text accompanying notes 158-61 (Ninth Circuit); compare *supra* note 150 and accompanying text, with *supra* text accompanying notes 163-80 (Seventh Circuit).

<sup>296</sup> See *supra* text accompanying notes 239-45 (Third Circuit); *supra* text accompanying notes 246-56 (Sixth Circuit).

<sup>297</sup> See *supra* text accompanying notes 259-73.

<sup>298</sup> See FED. R. CIV. P. 11(c)(1)(B), 11(c)(2); see also *supra* notes 85-100 and accompanying text.

## a. The Order to Show Cause Procedure and Due Process

The order to show cause procedure, namely, the requirement that the district court enter an order specifically describing the conduct violating Rule 11,<sup>299</sup> embodies the principle of due process, and due process does appear to be required by the federal appellate courts.<sup>300</sup> At a minimum, due process requires that the party against whom sanctions are sought be given: (1) particularized notice of the conduct alleged to be sanctionable; (2) particularized notice of the authority or authorities under which sanctions are being sought; and (3) an opportunity to respond.<sup>301</sup>

The purpose of such particularized notice is to make counsel explicitly aware of the factors she must address if she is to avoid

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<sup>299</sup> See FED. R. CIV. P. 11(c)(1)(B). "On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." *Id.*

<sup>300</sup> See, e.g., *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57 (2d Cir. 2000) (holding that Rule 11(c)(1)(B), which allows the federal district courts to impose Rule 11 sanctions via an order to show cause, "embodies the due process principle that 'a party is entitled to notice of the provision under which sanctions are sought, in order that he be forewarned as to the standard under which his conduct is to be evaluated'" (citation omitted). In *Baffa*, the Second Circuit reversed the \$45,000 Rule 11 sanctions imposed on plaintiff because, among other things, the district court failed to enter an order to show cause and, therefore, denied the sanctioned plaintiff notice and opportunity to respond. *Id.*

<sup>301</sup> See, e.g., *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997).

An attorney whom the court proposes to sanction 'must receive specific notice of the conduct alleged to be sanctionable . . . , and an opportunity to be heard on the matter,' and 'must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges.'

*Id.* (citations omitted). See also *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994) ("The party sought to be sanctioned is entitled to particularized notice of including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, [and] 2) the reasons why sanctions are under consideration . . . .") (citations omitted). In the Second Circuit, the party moving for sanctions is also required to provide notice of the standard by which the allegedly sanctionable conduct is to be assessed. See, e.g., *Sakon*, 119 F.3d at 114 (reversing \$2,700 sanctions imposed by district court for, among other things, violating due process by failing to provide adequate notice). In the Third Circuit, the moving party is required to provide notice of the form sanctions might take. See, e.g., *Simmerman*, 27 F.3d at 64 (reversing sanctions imposed by district court via order to show cause for, among other things, violating due process by failing to provide notice and opportunity to respond).

sanctions.<sup>302</sup> The mere existence of a sanctioning rule or provision, like Rule 11 or 28 U.S.C. § 1927, therefore, does not provide sufficient notice to satisfy due process.<sup>303</sup> For example, the Second Circuit in *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*<sup>304</sup> reversed \$25,000 sanctions in the form of attorneys' fees imposed on plaintiff's counsel by a federal district court via an order to show cause.<sup>305</sup> The appellate court held that the sanctions violated due process when the district court failed to apprise the sanctioned plaintiff of the particular conduct that was alleged to be sanctionable or to provide him with a meaningful opportunity to respond.<sup>306</sup> The order to show cause merely informed plaintiff that the court would be awarding sanctions based on one or more of the four sanctioning provisions it listed, including Rule 11 and 28 U.S.C. § 1927.<sup>307</sup> The district court also failed to question plaintiff at the sanctions hearing about the "specific instances of conduct for which it later sanctioned [plaintiff]."<sup>308</sup>

Not surprisingly, therefore, the federal circuit courts generally appear to require the federal district courts to issue orders to show cause before they impose Rule 11 sanctions.<sup>309</sup> In *Johnson v. Waddell & Reed*,

<sup>302</sup> *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999) (citation omitted); cf. *Simmerman*, 27 F.3d at 64 ("Only with this information can a party respond to the court's concerns in an intelligent manner.").

<sup>303</sup> See, e.g., *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997) (reversing \$10,000 sanctions imposed against defense counsel by the district court on its own initiative pursuant to 28 U.S.C. § 1927 based on a finding that the sanctions violated due process because sanctioned attorney did not receive the notice he was entitled to—the only sanctioning provision he was adequately put on notice of was Rule 11); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 298 (3d Cir. 1996) (reversing a district court order imposing \$15,000 sanctions against plaintiff and his counsel, jointly and severally, pursuant to Rule 11 and 28 U.S.C. § 1927 because, among other things, the district court failed to provide plaintiff and his counsel with adequate notice and an opportunity to be heard).

<sup>304</sup> 174 F.3d 87 (2d Cir. 1999).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 92-93.

<sup>307</sup> *Id.* at 92. For a description of § 1927, see *supra* note 19.

<sup>308</sup> *Nuwesra*, 174 F.3d at 93.

<sup>309</sup> See, e.g., *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57 (2d Cir. 2000) (reversing \$45,000 Rule 11 sanctions imposed upon plaintiff by district court on its own initiative where the district court failed to enter an order to show cause and, therefore, denied plaintiff notice and opportunity to respond); *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999) (reversing district court imposed sanctions on a trustee, reasoning that the sanctions could be interpreted as stemming from a sua sponte Rule 11(c)(1)(B) decision, and if so, "the district court was required to afford [the trustee] notice describing the offending

*Inc.*,<sup>310</sup> for example, the Seventh Circuit reversed the district court's order granting defendants' Rule 11 sanctions for violations of due process.<sup>311</sup> Since defendants did not file a Rule 11 motion, the Seventh Circuit concluded on appeal that the district court must have acted on its own initiative in imposing Rule 11 sanctions in the form of attorneys' fees against plaintiff.<sup>312</sup> In reversing the district court, the Seventh Circuit stated,

Rule 11 was specifically and clearly amended to add formality to the procedure by which a district court could impose sanctions on its own initiative. Thus, a *sua sponte* action by the district court concerning the imposition of sanctions must include notice and an opportunity to respond. An order from the court must describe the specific conduct which appears to violate Rule 11 and direct the party or counsel to show cause why it has not violated the rule.<sup>313</sup>

The appellate court also rejected defendants' argument that review of the sanctions award by the district court via plaintiff's Rule 59(e) motion for consideration satisfied the order to show cause requirement and, therefore, due process.<sup>314</sup> The main problem with the Rule 59(e) procedure, according to the appellate court, was that the notice and opportunity to respond provided "occurred after the sanctions had been imposed and while they remained in effect . . . . Such a procedure[, therefore,] complie[d] with neither the letter nor the spirit of Rule

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conduct and allow him an opportunity to show cause why sanctions should not be imposed," yet the record revealed that the trustee was given no such notice or opportunity and no formal order was issued); *L.B. Foster Co. v. Am. Piles, Inc.*, 138 F.3d 81, 90 (2d Cir. 1998) (reversing Rule 11 and 28 U.S.C. § 1927 sanctions where plaintiff's request for sanctions failed to satisfy Rule 11 motion requirements and the district court did not enter an order to show cause "or otherwise give [defendant] notice as to the provisions under which it was considering sanctions"); cf. *Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir. 1994) (vacating \$500 sanction and remanding to district court with instructions that, "[w]hen acting on its own initiative, . . . the district court should first enter an order describing the specific conduct that it believes will warrant sanctions and direct the person it seeks to sanction to show cause why particular sanctions should not be imposed").

<sup>310</sup> 74 F.3d 147 (7th Cir. 1996).

<sup>311</sup> *Id.* at 152.

<sup>312</sup> *Id.* at 151.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

11(c)(1)(B), which require[d] notice and an opportunity to respond before sanctions [were] imposed.”<sup>315</sup> Thus, because the procedure mandated for a district court’s award of sanctions on its own initiative was not followed, the district court abused its discretion by imposing sanctions against plaintiff.<sup>316</sup>

But does Rule 11, and the federal appellate courts, actually require the district courts to issue a *written* order to show cause? In other words, can statements on the record or even an oral order to show cause satisfy Rule 11 and due process?

The text of Rule 11 only states that, “[o]n its own initiative, *the court may enter an order* describing the specific conduct that appears to violate subdivision (b) and *directing an attorney, law firm, or party to show cause* why it has not violated subdivision (b) with respect thereto.”<sup>317</sup> Nothing in the text, therefore, explicitly requires a written order. Nor do the appellate opinions discussing the significance of an order to show cause actually indicate that the order must be made in writing.<sup>318</sup> In fact, the Second Circuit has stated in dicta that “a judge’s statements on the record could satisfy the requirements of Rule 11(c)(1)(B) in the absence of a written order to show cause,”<sup>319</sup> and the Ninth Circuit has held similarly in an unpublished opinion.<sup>320</sup>

The question, however, remains—can an oral order to show cause or statements on the record by a district court satisfy due process? Arguably such statements, if they provide the particularized notice required by due process, can be sufficient. The problem, however, as the Ninth Circuit case demonstrates, is that the statements may not provide particularized notice and meaningful opportunity to respond yet may be deemed to satisfy the order to show cause procedure, satisfying due process on appeal.<sup>321</sup>

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 151-52.

<sup>317</sup> FED. R. CIV. P. 11(c)(1)(B) (emphasis added).

<sup>318</sup> See generally the cases cited in this Part, Part III.A.2.a.

<sup>319</sup> *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 n.2 (2d Cir. 1999) (assuming, without deciding, that such statements would satisfy the order to show cause procedure required by Rule 11).

<sup>320</sup> *Hutchinson v. Hensley Flying Serv., Inc.*, No. 98-35361, 2000 WL 11432 (9th Cir. Jan. 6, 2000).

<sup>321</sup> See *id.*

In *Hutchinson v. Hensley Flying Service, Inc.*,<sup>322</sup> a federal district judge, upon his own initiative, imposed Rule 11 sanctions in the form of attorneys' fees upon plaintiff and his counsel for altering a document used in their opposition to defendants' motion to dismiss.<sup>323</sup> Plaintiff and his counsel appealed. On appeal they argued that the district court's failure to issue an order to show cause rendered the sanction order procedurally defective.<sup>324</sup> The Ninth Circuit disagreed because the district court: (1) had ordered plaintiff and his counsel, in open court and by subsequent written order, to appear at an evidentiary hearing; (2) made it unmistakably clear that the hearing would result in a sanction order; and (3) specifically requested objections from plaintiff and his counsel to the notice of the sanction hearing and received none.<sup>325</sup> Under these circumstances, the Ninth Circuit held that "[t]he district judge gave more than sufficient notice that the parties would have to show cause why sanctions should not issue."<sup>326</sup> The court also dismissed the sanctioned parties' argument because "this *procedural issue* was not raised in the district court."<sup>327</sup>

The problem, of course, is that the order to show cause procedure is "intended to ensure due process."<sup>328</sup> Contrary to the Ninth Circuit's statement, therefore, the order to show cause procedure is not simply a "procedural issue." The question, moreover, is not whether the sanctioned parties knew some kind of sanctions were coming. Rather, the question is really whether the procedure the district court followed provided the sanctioned parties with the particularized notice and opportunity to respond that they were entitled to under due process. In *Hutchinson*, one could probably safely assume, based on the facts of the case, that plaintiff and his counsel were aware of the conduct alleged to be sanctionable. But the district court's statements and order to appear at a hearing do not seem to provide plaintiff and his attorney with particularized notice of the authority or authorities under which

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at \*1.

<sup>324</sup> *Id.* at \*2.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (emphasis added).

<sup>328</sup> See *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 150 (7th Cir. 1996); see also *supra* Part III.A.2.a.



sanctions were being contemplated.<sup>329</sup> Nor does it provide a meaningful opportunity to respond, especially not when a meaningful opportunity presupposes that the parties against whom sanctions are being sought are made explicitly aware of the factors they must address in order to avoid sanctions.<sup>330</sup> Nothing the district court did in *Hutchinson* appears to have satisfied these requirements.

Consequently, while nothing in the text of Rule 11 or in the appellate cases discussing the issue specifically requires the district courts to issue a written order to show cause,<sup>331</sup> it would seem that such a requirement would be the better practice. To the extent, however, that oral orders to show cause and/or statements on the record are deemed sufficient to satisfy Rule 11's order to show cause procedure, these types of "orders" must still be examined carefully to ensure that they do in fact satisfy due process.

#### b. Timing

Unlike the Rule 11 motion, *when* an order to show cause can be issued is explicitly limited under Rule 11 in one circumstance. If the district court wants to impose monetary sanctions on its own initiative, it must issue the order to show cause prior to a voluntary dismissal or settlement of the claims.<sup>332</sup> But what about situations that do not involve monetary sanctions or voluntary dismissals or settlements? Can a district court issue an order to show cause at any time in those circumstances, even if it is *after* the conclusion of a case? The Third Circuit appears to be the only circuit, of the four federal appellate courts examined here that have adopted a rule or policy requiring Rule 11 motions to be served and filed prior to final disposition of a case, to have

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<sup>329</sup> In fact, the Ninth Circuit rejected defendants' argument that the sanctions were actually imposed under the district court's inherent power and 28 U.S.C. § 1927, specifically because the sanctions award was not properly itemized in terms of sanctioning authority. *Hutchinson*, 2000 WL 11432, at \*1.

<sup>330</sup> *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999) (citation omitted); cf. *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994) ("Only with this information can a party respond to the court's concerns in an intelligent manner.").

<sup>331</sup> However, the Second Circuit's statement in *Nuwesra*, that "a judge's statements on the record could satisfy the requirements of [Rule 11] (c)(1)(B) in the absence of a written order to show cause," could be read as suggesting that a written order to show cause is or should be the normal practice. *Nuwesra*, 174 F.3d at 92 n.2.

<sup>332</sup> See FED. R. CIV. P. 11(c)(2)(B).

adopted a similar approach with respect to orders to show cause.<sup>333</sup> Thus, in the Third Circuit, if a federal district court judge wants to impose Rule 11 sanctions on her own initiative, she must issue her order to show cause before the case is finally concluded.<sup>334</sup> Otherwise the order to show cause will be deemed untimely and any Rule 11 sanctions imposed pursuant to the order to show cause will be deemed an abuse of discretion.<sup>335</sup> According to the Third Circuit, the logic that impelled the court to adopt a supervisory rule in the first instance with respect to the filing of Rule 11 motions, namely to avoid piecemeal appeals of the merits and fee questions, applied “equally to *sua sponte* consideration of sanctions by the district court.”<sup>336</sup> Moreover, the court reasoned that there was simply “no reason why prompt action should be required of an opposing party and yet not similarly required by the court.”<sup>337</sup>

None of the other three circuits that adopted timing restrictions with respect to the serving and filing of Rule 11 motions appear to have followed suit with respect to orders to show cause. In fact, the Sixth and Ninth Circuits have both taken the position that, since there is no safe harbor provision when the district court acts *sua sponte*, nothing either court has said with respect to the safe harbor provision, Rule 11 motions, and timing applies to the district courts acting on their own initiative. Consequently, the district courts in those circuits are not precluded from issuing orders to show cause and imposing Rule 11 sanctions after final

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<sup>333</sup> Those four circuit courts are the Third, Fifth, Sixth, and Ninth Circuits. See *supra* text accompanying notes 196-238.

<sup>334</sup> Cf. *Simmerman*, 27 F.3d 58 (reversing as abuse of discretion Rule 11 sanctions by the district court issued three months after the case was decided).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 63. The court stated,

There is no inordinate burden in requiring the district court to raise and resolve any Rule 11 issues prior to or concurrent with its resolution of the merits of the case. Such timing will, furthermore, conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter. Similarly, concurrent consideration of challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions.

*Id.*

<sup>337</sup> *Id.*

judgment has been entered.<sup>338</sup> While research did not reveal case law out of the Seventh Circuit addressing this particular issue, in light of that circuit's *Divane* opinion, it seems highly unlikely that district courts in the Seventh Circuit would be precluded from issuing orders to show cause and imposing Rule 11 sanctions after final judgment.<sup>339</sup>

### c. Troubling Uses of Orders to Show Cause

Finally, two very troubling uses of the order to show cause procedure should be discussed briefly. First, federal district courts are explicitly prohibited by Rule 11 from awarding monetary sanctions in the form of attorneys' fees when acting on their own initiative.<sup>340</sup> Notwithstanding this limitation, the district courts award such sanctions, and, on a couple of occasions, these sanctions have been affirmed on appeal. Second, there is some suggestion in the case law that orders to show cause are being requested and/or issued in situations where the procedural requirements of a Rule 11 motion have not been satisfied in order to sidestep those requirements.<sup>341</sup>

Out of the forty-three Rule 11 decisions rendered by the federal circuit courts and collected for this article,<sup>342</sup> twelve (or 28%) involve orders to show cause.<sup>343</sup> Of these twelve cases, nine (or 75%) involve

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<sup>338</sup> See *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998) ("As the Sixth Circuit . . . observed, the safe harbor provision applies only to sanctions imposed upon motion of a party . . . . Nothing in the Rule or the history of the 1993 amendments prevents the district court from taking this action after judgment."); *Ridder v. City of Springfield*, 109 F.3d 288, 297 n.8 (6th Cir. 1997) ("Our construction of Rule 11's 'safe harbor' provision does not in any way preclude the ability of a district court or magistrate judge, on his or her own initiative, to enter an order describing the offending conduct and directing the offending attorney to show cause why Rule 11 has not been violated.").

<sup>339</sup> See *supra* text accompanying notes 278-90 (discussing *Divane*).

<sup>340</sup> See FED. R. CIV. P. 11.

<sup>341</sup> See *infra* notes 348-64 and accompanying text.

<sup>342</sup> This is admittedly a small sample relative to the total amount of Rule 11 activity generated by these six federal appeals courts. Any numbers generated, therefore, would not be deemed statistically significant. I include these numbers, however, because based on the rather random sampling of cases selected for this Article, they *suggest* certain trends in the federal courts.

<sup>343</sup> See *Vollmer v. Publishers Clearing House*, 248 F.3d 698 (7th Cir. 2001); *Van Scoy v. Shell Oil Co.*, No. 00-15087, 2001 WL 338071 (9th Cir. Apr. 5, 2001); *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102 (9th Cir. 2001); *Heldt v. Nicholson*, No. 00-1495, 2001 WL 111648 (6th Cir. Jan. 31, 2001); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52 (2d Cir. 2000); *Hutchinson v. Hensley Flying Serv., Inc.*, No. 98-35361, 2000 WL 11432 (9th Cir. Jan. 6, 2000); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir.

Rule 11 sanctions in the form of attorneys' fees.<sup>344</sup> The federal appellate courts reversed seven out of these nine cases (or 78% of them), recognizing that the 1993 amendments to Rule 11 explicitly prohibit such sanctions,<sup>345</sup> but they affirmed one case on appeal (11%)<sup>346</sup> and explicitly approved the use of attorneys' fees as a Rule 11 sanction in another (11%).<sup>347</sup> It is very problematic to allow these sanctions to stand on

1999); *Goldin v. Bartholow*, 166 F.3d 710 (5th Cir. 1999); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450 (5th Cir. 1998); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996); *Wesely v. Churchill Dev. Corp.*, No. 95-4024, 1996 WL 616636 (6th Cir. Oct. 24, 1996); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147 (7th Cir. 1996).

<sup>344</sup> *Van Scoy*, 2001 WL 338071 (\$63,944.11); *United Nat'l Ins. Co.*, 242 F.3d 1102 (\$2,058); *Heldt*, 2001 WL 111648 (\$6,429); *Baffa*, 222 F.3d 52 (\$45,000); *Hutchinson*, 2000 WL 11432 (amount not specified); *Nuwesra*, 174 F.3d 87 (\$25,000); *Thornton*, 136 F.3d 450 (amount not specified); *Zuk*, 103 F.3d 294 (approximately \$15,000); *Johnson*, 74 F.3d 147 (\$800).

<sup>345</sup> *Baffa*, 222 F.3d at 57 ("[A]bsent a specific motion for attorneys' fees, the court only had authority to order sanctions payable to the court. Under Rule 11(c)(2), the court may order payment of attorneys' fees only 'if imposed on motion and warranted for effective deterrence.'"); *Nuwesra*, 174 F.3d at 94 ("[A] court may award attorneys' fees under Rule 11 only 'if imposed on motion' under Rule 11(c)(1)(A). By its own terms, the rule thus precludes a court from awarding attorneys' fees on its own initiative.") (citations omitted); *Thornton*, 136 F.3d at 455 ("[W]here sanctions are imposed under Rule 11(c)(1)(B) by a district court on its own initiative, neither the award of attorney's fees nor the suspension from practice before the court constitute a valid sanction. Specifically, an award of attorney's fees is authorized only 'if imposed on motion . . .'" (citation omitted); *Johnson*, 74 F.3d at 152 n.3.

It should also be noted that where sanctions are imposed under Rule 11(c)(1)(B) by the district judge on his own initiative, Rule 11(c)(2) provides that payment of sanctions may be directed only to the court as a penalty . . . [Thus,] [e]ven if the 'show cause' procedure of Rule 11 had been followed, the portion of the award of sanctions payable to Waddell & Reed would nevertheless have been improper.

*Johnson*, 74 F.3d at 152 n.3. See also *Van Scoy*, 2001 WL 338071, at \*3 ("The panel held that the district court may only award sanctions to . . . defendants under Rule 11(c)(1)(A) if the [defendants] had filed a separate, properly noticed motion. They had not done so."); *United Nat'l Ins. Co.*, 242 F.3d at 1118; *Hutchinson*, 2000 WL 11432, at \*1 ("Attorney's fees may only be awarded under Rule 11 after a motion by a party. Appellees did not move for an award of attorney's fees, therefore the award of fees is not justified under Rule 11.").

<sup>346</sup> See *Heldt*, 2001 WL 111648, at \*1 (holding that the district court did not abuse its discretion in imposing Rule 11 sanctions in the form of attorneys' fees against plaintiff).

<sup>347</sup> The Third Circuit approved the use of attorneys' fees as a Rule 11 sanction in *Zuk*. 103 F.3d at 301. In *Zuk*, a Rule 11 motion was filed by defendants and an order to show cause was issued by the court. *Id.* at 296. It appears from the opinion that Rule 11 sanctions in the form of attorneys' fees were ultimately imposed against plaintiff pursuant to defendants' motion, but this is not absolutely certain. See *id.* at 297. Plaintiff argued on appeal that the requirements of a Rule 11 motion had not been met. *Id.* To counter this argument, defendants argued that the Rule 11 sanctions had actually been imposed by the district court via its order to show cause. *Id.* at 298 n.3. The Third Circuit dismissed the

appeal because it undermines the Advisory Committee's efforts to limit the use of monetary sanctions as the sanction of choice by the federal district courts, and it sends the wrong message to the district courts, namely, that the use of such sanctions is appropriate.

Lastly, some appellate case law suggests that orders to show cause are being requested and/or issued in situations where the procedural requirements of a Rule 11 motion have not been satisfied in order to sidestep those requirements. For example, in *Radcliffe v. Rainbow Construction Co.*,<sup>348</sup> defendants were awarded \$75,000 in attorneys' fees as a Rule 11 sanction by the district court, notwithstanding the fact that their Rule 11 motion failed to comply with the Rule's procedural requirements.<sup>349</sup> On appeal, the Ninth Circuit reversed the district court's sanction order for precisely that reason.<sup>350</sup> The appellate court also rejected defendants' invitation to treat the district court's order for sanctions as "a Rule 11 motion on the court's own initiative, pursuant to Fed. R. Civ. P. 11(c)(1)(B)" because the record was clear that defendants, not the court, requested the sanctions.<sup>351</sup> According to the court, "it would render Rule 11(c)(1)(A)'s 'safe harbor' provision meaningless to permit a party's noncompliant motion to be converted automatically into a court-initiated motion, thereby escaping the service requirement."<sup>352</sup>

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conflict between the Rule 11 procedures as moot, since plaintiff admitted that he would not have taken advantage of the safe harbor provision even if it had been provided. *Id.* The appellate court ultimately concluded that, "[a]lthough monetary sanctions are not encouraged under Rule 11, they are not forbidden. Under the circumstances of this case, we see no error in the district court's imposition of fee sanctions upon the appellant, although the amount may be contrary to the current spirit of Rule 11." *Id.* at 301 (emphasis added). In short, the appellate court did not find any error in the imposition of sanctions under Rule 11. *Id.* at 298. The district court's sanctions were ultimately reversed, however, because the order did not specify how much of the attorneys' fees were awarded pursuant to Rule 11, as opposed to 28 U.S.C. § 1927. *Id.* Unfortunately, the Third Circuit's analysis of the Rule 11 issues raised in the case was doubly wrong because: (a) if the Rule 11 sanctions were awarded pursuant to defendants' motion, the sanctions were improper because the Rule's motion requirements had not been satisfied; and (b) if the attorneys' fees were imposed as a sanction by the district court via its order to show cause, they were still improper because the district court is forbidden by Rule 11 to order such sanctions on its own initiative.

<sup>348</sup> 254 F.3d 772 (9th Cir. 2001).

<sup>349</sup> *Id.* at 777.

<sup>350</sup> *Id.* at 789.

<sup>351</sup> *Id.* ("The district court's discussion of the safe harbor provision in its order concerning sanctions serves to emphasize this point.").

<sup>352</sup> *Id.*

A similar issue was at least implicitly raised in *Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania*.<sup>353</sup> In *Zuk*, the defendant filed a Rule 11 motion after plaintiff's case was dismissed, but apparently without satisfying the Rule's safe harbor provision.<sup>354</sup> Approximately a month and a half later, the district court issued an order to show cause "in consideration of defendant's motion for sanctions."<sup>355</sup> The district court imposed Rule 11 sanctions.<sup>356</sup> The issue regarding whether the Rule 11 sanctions were imposed via motion or the order to show cause was raised on appeal.<sup>357</sup> The Third Circuit, however, determined that it did not need to address the issue.<sup>358</sup>

Finally, a case from the Fifth Circuit and another from the Ninth Circuit could be read as specifically inviting the practice.<sup>359</sup> In *Elliott v. Tilton*,<sup>360</sup> for example, the Fifth Circuit reversed the district court's imposition of Rule 11 sanctions against defendants because plaintiffs' Rule 11 motion failed to comply with the safe harbor provision.<sup>361</sup> Thus, according to the Fifth Circuit, the district court's order could not be upheld under Rule 11.<sup>362</sup> Notwithstanding this holding, however, the Fifth Circuit went on to state that

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<sup>353</sup> 103 F.3d 294 (3d Cir. 1996).

<sup>354</sup> *Id.* at 296. Plaintiff argued on appeal that sanctions were improperly imposed because "he was not given the benefit of Rule 11's 21-day safe harbor period, because the court dismissed the action before he had the full opportunity to withdraw it." *Id.* at 298 n.3.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 296.

<sup>357</sup> Plaintiff argued that Rule 11 sanctions were improperly imposed via defendant's motion. *Id.* at 298 n.3. Defendant countered by arguing that the sanctions were imposed via the district court's order to show cause. *Id.*

<sup>358</sup> *Id.* at 299 (concluding that they need not address the issue since plaintiff admitted at oral argument that he would not have taken advantage of the safe harbor provision, even had it been provided).

<sup>359</sup> See *Van Scoy v. Shell Oil Co.*, No. 00-15087, 2001 WL 338071 (9th Cir. Apr. 5, 2001); *Elliott v. Tilton*, 64 F.3d 213 (5th Cir. 1995). In *Van Scoy*, the Ninth Circuit reversed a district court's imposition of Rule 11 sanctions in the amount of \$63,944.11 because defendants had failed to file a Rule 11 motion that complied with the Rule's procedural requirements. *Van Scoy*, 2001 WL 338071, at \*3. It is not clear from the opinion, however, whether sanctions were imposed via the defendants' Rule 11 motion or the order to show cause, that the district court issued. *Id.* Nevertheless, the Ninth Circuit stated on appeal that "on remand the district court may award sanctions under 11(c)(1)(B), which permits a court to impose sanctions on its own initiative." *Id.*

<sup>360</sup> 64 F.3d 213 (5th Cir. 1995).

<sup>361</sup> *Id.* at 216.

<sup>362</sup> *Id.*

We do not mean to indicate that defense counsel was necessarily shielded from all sanctions under Rule 11. Sanctions may be ordered if the court, on its own initiative, enters an order describing the offending conduct and directing the offending parties to show cause why Rule 11 has not been violated. This subsection contains no 'safe harbor' provision.<sup>363</sup>

Certainly, federal district courts may impose Rule 11 sanctions on their own initiative.<sup>364</sup> But surely an order to show cause should not be requested, let alone be issued, simply *because* a movant fails to satisfy Rule 11's motion requirements. To permit this practice would undermine significant portions of the 1993 amendments.

#### d. Summary

Here, as with Rule 11 motion practice, the federal appellate case law appears to highlight some inter-circuit conflicts with respect to order to show cause practice and suggests that there may be some troubling trends regarding the ways in which orders to show cause are being used in the federal district courts. More specifically, there appear to be intercircuit conflicts regarding: (1) due process—the Second, Third, Fifth, and Seventh Circuits have all taken the position that an order to show cause is an integral part of due process and, therefore, an actual order must be issued;<sup>365</sup> the Ninth Circuit, however, seems to regard orders to show cause as simply a procedural requirement that can be satisfied by statements on the record,<sup>366</sup> and the Second Circuit has also intimated that such statements may be sufficient, in lieu of an actual order;<sup>367</sup> (2) timing—the Third Circuit has applied its supervisory rule to orders to show cause, therefore requiring a district court to issue its order prior to final judgment or have that order be deemed untimely;<sup>368</sup> the Sixth, Seventh, and Ninth Circuits, however, impose no such limitation on when the district courts may (or should) issue their orders to show

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<sup>363</sup> *Id.* (citations omitted).

<sup>364</sup> See FED. R. CIV. P. 11(c)(1)(B). Of course, there is a related question as to *when* a district court should be allowed to issue an order to show cause. See *supra* Part III.A.2.b. That particular issue will be discussed later in this work. See *infra* Part IV.B.

<sup>365</sup> See *supra* notes 299-316 and accompanying text.

<sup>366</sup> See *supra* text accompanying notes 320-27.

<sup>367</sup> See *supra* text accompanying note 319.

<sup>368</sup> See *supra* notes 333-37 and accompanying text.

cause;<sup>369</sup> and (3) attorneys' fees—the Second, Fifth, Seventh, and Ninth Circuits have all held that awarding attorneys' fees as a sanction pursuant to an order to show cause is not authorized by amended Rule 11;<sup>370</sup> the Third and Sixth Circuits, however, have affirmed such fees imposed by the district courts.<sup>371</sup>

The appellate case law also suggests some troubling trends with respect to the use of orders to show cause, namely: (1) attorneys' fees seem to be the sanction of choice when a district court imposes Rule 11 sanctions pursuant to an order to show cause;<sup>372</sup> and (2) orders to show cause are perhaps being issued, requested, and/or invited to circumvent the procedural requirements for a Rule 11 motion.<sup>373</sup> Equally troubling is the fact that such uses of the order to show cause are sometimes authorized on appeal.<sup>374</sup>

### 3. "Appropriate" Sanctions

Earlier, monetary sanctions and the use of Rule 11 as a fee-shifting device were discussed as one of the factors contributing to Rule 11's chilling effects.<sup>375</sup> The federal district courts imposed sanctions in thirty-eight of the forty-three cases on appeal.<sup>376</sup> They imposed monetary

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<sup>369</sup> See *supra* notes 338-39 and accompanying text.

<sup>370</sup> See *supra* notes 342-45 and accompanying text.

<sup>371</sup> See *supra* notes 346-47 and accompanying text.

<sup>372</sup> See *supra* notes 342-44 and accompanying text.

<sup>373</sup> See *supra* text accompanying notes 348-64.

<sup>374</sup> See *supra* Part III.A.2.c.

<sup>375</sup> See *supra* notes 67-69 and accompanying text.

<sup>376</sup> Sanctions were granted pursuant to twelve orders to show cause and a total of twenty-six Rule 11 motions were granted, for a total of thirty-eight. See *supra* note 343 and accompanying text; see also SECOND CIRCUIT: *Margo v. Weiss*, 213 F.3d 55 (2d Cir. 2000); *L.B. Foster Co. v. Am. Piles, Inc.*, 138 F.3d 81 (2d Cir. 1998); *Sakon v. Andreo*, 119 F.3d 109 (2d Cir. 1997); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320 (2d Cir. 1995); THIRD CIRCUIT: *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996); FIFTH CIRCUIT: *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542 (5th Cir. 2001); *Edwards v. Gen. Motors Corp.*, 153 F.3d 242 (5th Cir. 1998); *Elliott v. Tilton*, 64 F.3d 213 (5th Cir. 1995); SIXTH CIRCUIT: *Hayden v. Sass*, No. 99-1243, 2000 WL 1140516 (6th Cir. Aug. 2, 2000); *Singh v. Capital Univ. Law & Graduate Ctr.*, No. 99-3564, 2000 WL 302778 (6th Cir. Mar. 17, 2000); *Powell v. Squire, Sanders & Dempsey*, Nos. 98-3668, 98-3670, 1999 WL 519186 (6th Cir. July 16, 1999); *Cobleigh v. United States*, No. 97-2302, 1999 WL 195738 (6th Cir. Mar. 23, 1999); *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998); *Bernstein v. Remer*, No. 96-2232, 1997 WL 685369 (6th Cir. Oct. 29, 1997); *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997); *Ortman v. Thomas*, 99 F.3d 807 (6th Cir. 1996); SEVENTH CIRCUIT: *Divane v. Krull Elec. Co., Inc.*, 200 F.3d 1020 (7th Cir. 1999); *Harter v.*



sanctions in the form of attorneys' fees in twenty-eight<sup>377</sup> of those thirty-eight cases.<sup>378</sup> Another eight cases<sup>379</sup> involve some kind of monetary sanctions.<sup>380</sup> The amount of the sanctions ranged from lows of \$200<sup>381</sup> or

Iowa Grain Co., Nos. 96-3907, 97-2671, 96-4074, 97-2041, 1999 WL 754333 (7th Cir. July 15, 1998); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041 (7th Cir. 1998); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147 (7th Cir. 1996); NINTH CIRCUIT: *Habib v. Cruz*, No. 00-17103, 2001 WL 985637 (9th Cir. Aug. 28, 2001); *Enercon, GMBH v. Erdman*, No. 00-15399, 2001 WL 777476 (9th Cir. July 11, 2001); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001); *Hugo Neu-Proler Co. v. Local 13 Int'l Longshoreman and Warehouse Union*, No. 99-55322, 2000 WL 1459766 (9th Cir. Sept. 28, 2000); *Flanagan v. Arnaiz*, No. 97-15517, 1999 WL 1128641 (9th Cir. Dec. 7, 1999); *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998).

<sup>377</sup> See SECOND CIRCUIT: *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52 (2d Cir. 2000) (\$45,000); *Margo*, 213 F.3d at 59 (\$22,680); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 90 (2d Cir. 1999) (\$25,000); *Sakon*, 119 F.3d at 113 (\$2,700); *Hadges*, 48 F.3d at 1324 (\$2,000); THIRD CIRCUIT: *Zuk*, 103 F.3d at 343 (\$15,000); FIFTH CIRCUIT: *Mercury Air Group*, 237 F.3d at 545 (\$203,641); *Edwards*, 153 F.3d at 245 (\$46,820); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998) (all fees reasonably incurred by defendant in defending suit); *Elliott*, 64 F.3d at 215 (\$7,850); SIXTH CIRCUIT: *Heldt v. Nicholson*, No. 00-1495, 2001 WL 111648 (6th Cir. Jan. 31, 2001) (\$6,429); *Crown Serv. Plaza Partners v. City of Rochester Hills*, Nos. 98-1581, 98-1666, 2000 WL 658029, \*2 (6th Cir. May 8, 2000) (\$24,987.21); *Singh*, 2000 WL 302778, at \*1 (\$2,000); *Powell*, 1999 WL 519186, at \*2 (\$1,000); *Cobleigh*, 1999 WL 195738, at \*1 (\$360); *Barker*, 1998 WL 466437, at \*1 (\$28,640.80); *Ridder*, 109 F.3d at 298 (\$32,546.02); *Ortman*, 99 F.3d at 810 (\$24,809.99); SEVENTH CIRCUIT: *Divane*, 200 F.3d at 1024 (\$33,292); *Harter*, 1999 WL 754333, at \*2 (\$92,000); *Corley*, 142 F.3d at 1057 (\$200); *Johnson*, 74 F.3d at 150 (\$800); NINTH CIRCUIT: *Radcliffe*, 254 F.3d at 779 (\$75,000); *Enercon*, 2001 WL 777476, at \*1 (\$25,000); *Van Scoy v. Shell Oil Co.*, No. 00-15087, 2001 WL 338071, at \*3 (9th Cir. Apr. 5, 2001) (\$63,944.11); *Hugo Neu-Proler Co.*, 2000 WL 1459766, at \*1 (9th Cir. Sept. 28, 2000) (\$51,138.53); *Hutchinson v. Hensley Flying Serv., Inc.*, No. 98-35361, 2000 WL 11432 (9th Cir. Jan. 6, 2000) (amount not specified); *Barber*, 146 F.3d at 710 (\$2,500).

<sup>378</sup> I collected one hundred and thirty-five circuit court and district court opinions for this article. See Appendices 1, 2.

<sup>379</sup> Four of the eight cases imposing other monetary sanctions also imposed attorneys' fees as a sanction.

<sup>380</sup> *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001) (\$50,000 fine to be paid to charity); *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1109 (9th Cir. 2001) (imposing sanctions on two attorneys in the amount of \$1,029 each but not specifying whether the sanctions were paid to the opposing party or into court as a fine); *Crown Service Plaza Partners*, 2000 WL 658029, at \*2 (\$2,380.71 in costs); *Singh*, 2000 WL 302778, at \*1 (\$1,000 fine to be paid into court); *Divane*, 200 F.3d at 1024 (\$2,306.69 in costs); *Powell*, 1999 WL 519186, at \*2 (\$10,000 fine to be paid to the Clients Security Fund of Ohio, but payment was suspended upon certain conditions being met); *L.B. Foster Co.*, 138 F.3d at 89 (awarding plaintiff part of the expenses it incurred in seeking a Rule 54(b) certification as a Rule 11 sanction without stating whether "expenses" included attorneys' fees.); *Wesely v. Churchill Dev. Corp.*, No. 95-4024, 1996 WL 616636, at \*2 (6th Cir. Oct. 24, 1996) (\$2,000 fine to be paid into court).

<sup>381</sup> *Corley*, 142 F.3d 1041.

\$360<sup>382</sup> to highs of \$92,000<sup>383</sup> and even \$203,641.<sup>384</sup> Of the twenty-eight cases dealing with attorneys' fees, eleven were affirmed on appeal.<sup>385</sup> Several others were vacated and remanded to the district court to either re-calculate the amount of sanctions to be imposed<sup>386</sup> or to re-impose sanctions after curing procedural defects.<sup>387</sup>

All told, the federal appellate courts approved the use of monetary sanctions in eleven of the twenty-eight cases, or 39% of the time. In practice, there the federal appellate courts appear to reverse or vacate most of the Rule 11 decisions involving monetary sanctions; but a significant percentage of them get affirmed on appeal, and the rhetoric in some of the opinions seems to encourage continued reliance on monetary sanctions under the 1993 version of Rule 11.<sup>388</sup> Thus, there

<sup>382</sup> *Cobleigh*, 1999 WL 195738, at \*1.

<sup>383</sup> *Harter v. Iowa Grain Co.*, Nos. 96-3907, 97-2671, 96-4074, 97-2041, 1999 WL 754333 (7th Cir. July 15, 1998).

<sup>384</sup> *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 545 (5th Cir. 2001).

<sup>385</sup> See *Mercury Air Group*, 267 F.3d at 545 (\$203,641); *Enercon GMBH v. Erdman*, No. 00-15394, 2001 WL 777476, at \*1 (9th Cir. July 11, 2001) (affirming Rule 11 sanctions with respect to plaintiff and vacating and remanding with respect to plaintiff's attorney) (\$25,000); *Heldt v. Nicholson*, No. 00-1495, 2001 WL 111648 (6th Cir. Jan. 31, 2001) (\$6,429); *Hugo Neu-Proler Co. v. Local 13 Int'l Longshoreman and Warehouse Union*, No. 99-55322, 2000 WL 1459766, at \*2 (9th Cir. Sept. 28, 2000) (\$51,138.53); *Crown Serv. Plaza Partners*, 2000 WL 658029, at \*2 (\$24,987.21); *Singh & Graduate Ctr.*, No. 99-3564, 2000 WL 302778, at \*1 (6th Cir. Mar. 17, 2000) (\$2,000); *Margo v. Weiss*, 213 F.3d 55, 59 (2d Cir. 2000) (\$22,680); *Powell*, 1999 WL 519186, at \*2 (affirming imposition of the \$1,000 in attorneys' fees but vacating order to pay \$10,000 into Clients Security Fund of Ohio because it constituted a perpetual penalty); *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437, at \*1 (6th Cir. July 30, 1998) (\$28,640.80); *Ridder v. City of Springfield*, 109 F.3d 288, 290 (6th Cir. 1997) (\$32,546.02); *Ortman v. Thomas*, 99 F.3d 807, 810 (6th Cir. 1996) (\$24,809.99).

<sup>386</sup> See *Divane v. Krull Elec. Co., Inc.*, 200 F.3d 1020 (7th Cir. 1999); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996).

<sup>387</sup> *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57-58 (2d Cir. 2000) (vacating Rule 11 sanctions imposed upon the court's own initiative but leaving open the possibility for the sanctions to be reimposed on remand provided that the Rule's procedural requirements regarding orders to show cause were met); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (vacating Rule 11 sanctions imposed upon plaintiff's motion because of failure to comply with the safe harbor provision but appearing to encourage district court to impose sanctions on remand its own initiative). The Fifth Circuit in *Elliott* stated that it did not intend to "indicate that defense counsel was necessarily shielded from all sanctions under Rule 11. Sanctions may be ordered if the court, on its own initiative, enters an order describing the offending conduct and directing the offending parties to show cause why Rule 11 has not been violated." *Id.* (citation omitted).

<sup>388</sup> See, e.g., *Divane*, 200 F.3d at 1030 ("The 1993 amendments to Rule 11(c)(2) limited the amount of attorneys' fees that may be imposed as a sanction . . . but endorsed the use of

seems to be some mixed messages being sent by the federal appellate courts, which is troublesome given that the Advisory Committee explicitly *de-emphasized and limited* the use of monetary sanctions in the form of attorneys' fees as part of its effort to reduce Rule 11's chilling effects.

#### 4. The Role of the Federal Circuit Courts of Appeals in the Sanctioning Process

Inconsistent application among the federal circuits is cited as another factor contributing to Rule 11's chilling effects.<sup>389</sup> One of the reasons given for the inconsistent application that plagued the 1983 version of Rule 11 was insufficiently rigorous appellate review.<sup>390</sup> To determine whether this concern is warranted under the current version of the Rule, this section will look at how the federal appellate courts have interpreted their role in the sanctioning process. More specifically, this section will examine: (a) how the federal appellate courts interpret the standard of review governing their review of district courts' Rule 11 decisions; (b) whether the federal circuit courts of appeals have insisted that district courts comply with the findings requirement imposed by the 1993 amendments to Rule 11 as an aid to appellate review; and (c) the kind of direction that the federal appellate courts are providing to the district courts.

##### a. The Standard of Review

Notwithstanding the concern raised about the level of appellate review, abuse of discretion was retained by the Advisory Committee as the standard of review applicable to all aspects of a district court's Rule 11 decision.<sup>391</sup> Therefore, this raises the important question of how the federal circuit courts of appeals interpret this standard.

Not surprisingly, the federal circuit courts of appeals employ many different definitions of "abuse of discretion."<sup>392</sup> There does appear to be

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attorneys' fees as a sanction."); *Zuk*, 103 F.3d at 301 ("Although money sanctions are not encouraged under Rule 11, they are not forbidden.").

<sup>389</sup> See *supra* note 61 and accompanying text.

<sup>390</sup> See *supra* note 63 and accompanying text.

<sup>391</sup> See *supra* text accompanying notes 127-28.

<sup>392</sup> Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

a common definition employed by the Second, Fifth, Sixth, and Seventh Circuits. It provides that a district court abuses its discretion "if the court 'based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.'"<sup>393</sup> Abuse of discretion has been described by the Third Circuit as "a clear error of judgment, and not simply a different result which can arguably be obtained when applying the law to the facts of the case."<sup>394</sup> According to the Seventh Circuit, however, the district court has not abused its discretion "[u]nless the sanctioning court has acted contrary to the law or reached an unreasonable result."<sup>395</sup>

Perhaps of greater importance than the variations of the definition, the more common definition quoted above appears to be much more deferential than other formulations. For example, the Second Circuit recognizes that abuse of discretion is a deferential standard of review.<sup>396</sup> Nonetheless, the court had this to say about the potential problems with such a deferential standard and its own role in the sanctioning process,

[W]e [also] appreciate that "[a] troublesome aspect of a trial court's power to impose sanctions . . . is that the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed." . . . Accordingly, "although the decision to impose sanctions is uniquely within the province of a district court, we

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There are half a dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.

*Id.*

<sup>393</sup> *Zuk*, 103 F.3d at 298-99 (citation omitted); *see also* *Harter v. Iowa Grain Co.*, Nos. 96-3907, 97-2671, 96-4074, 97-2041, 1999 WL 754333 (7th Cir. July 15, 1998); *Wesely v. Churchill Dev. Corp.*, No. 95-4024, 1996 WL 616636, at \*2 (6th Cir. Oct. 24, 1996); *Elliott v. Tilton*, 64 F.3d 213, 215 (5th Cir. 1995).

<sup>394</sup> *Prosser v. Prosser*, 186 F.3d 403, 405 (3d Cir. 1999) (citation omitted).

<sup>395</sup> *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir. 2000) (citations omitted).

<sup>396</sup> *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57 (2d Cir. 2000) ("We have recognized that 'this deferential standard of review gives recognition to the premise that the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard that informs its determination as to whether sanctions are warranted.'" (citation omitted)).

nevertheless need to ensure that any such decision is made with restraint and discretion.”<sup>397</sup>

In a similar vein, the Seventh Circuit has stated,

We have frequently reminded litigants that although our review is deferential, it is not an empty formality . . . . “Because ‘Rule 11 sanctions have significant impact beyond the merits of the individual case’ and can affect the reputation and creativity of counsel, the abuse of discretion standard does not mean that we give complete deference to the district court’s decision.”<sup>398</sup>

Finally, a couple of the circuit courts of appeals employ several different tiers of review under the rubric of “abuse of discretion.” The Seventh Circuit, for example, has stated that it “review[s] a decision to grant sanctions under [Rule 11] for an abuse of discretion.”<sup>399</sup> It has interpreted this standard to mean, however, that it “review[s] the factual findings underlying the district court’s imposition of sanctions for clear error, . . . and the choice of sanction for an abuse of discretion.”<sup>400</sup> The Ninth Circuit, on the other hand, includes “abuse of discretion” as one of three standards governing that court’s review of sanctions decisions. More specifically, the Ninth Circuit has stated that, “[i]n reviewing sanctions imposed under Rule 11, we ‘review findings of historical fact under the clearly erroneous standard, the determination that counsel violated the rule under a de novo standard, and the choice of sanction under an abuse of discretion standard.’”<sup>401</sup>

All of the different formulations or definitions for “abuse of discretion” currently in use by the federal courts of appeals raise a few inferences. First, the courts’ interpretations do not appear to mean the same thing. In fact, they seem to suggest a general lack of a clearly defined standard for deciding what constitutes an “abuse of discretion.” Second, circuit court judges appear to interpret their role in the

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<sup>397</sup> *Id.* at 57 (ellipses in original) (citations omitted) (vacating \$45,000 sanctions).

<sup>398</sup> *Harter*, 1999 WL 754333, at \*3 (citations omitted) (reversing \$92,000 sanctions).

<sup>399</sup> *Fin. Inv. Co. (Bermuda), Ltd. v. Geberit AG*, 165 F.3d 526, 530 (7th Cir. 1998) (citation omitted).

<sup>400</sup> *Id.* (citations omitted).

<sup>401</sup> *United Nat’l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001) (citation omitted).

sanctioning process differently. Some circuit court judges review a district court's sanctioning decision less deferentially than others. This last inference suggests that the outcome of a district court's sanctions decision may well depend on the makeup of the panel that decides the appeal. Unfortunately, the consequence of this lack of uniformity is that inconsistent results with respect to the application of Rule 11 in practice will likely persist in the federal courts.<sup>402</sup>

#### b. The Findings Requirement

A potentially significant amendment added to Rule 11 in 1993 is the requirement that federal district courts make findings to support any decision imposing Rule 11 sanctions.<sup>403</sup> Prior to the 1993 amendment, however, several circuits, including the Fifth, Sixth, Seventh, and Ninth Circuits, had already imposed, implicitly or explicitly, a findings requirement under the 1983 version of Rule 11.<sup>404</sup> Experience under the prior case law indicates that, notwithstanding the de facto findings requirement, Rule 11's chilling effects continued unabated.<sup>405</sup> In fact, Judge Johnson of the Fifth Circuit Court of Appeals lamented that, "[u]nder the current practice[, i.e., under the 1983 Rule], many circuits have allowed district courts to decide for themselves when factual

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<sup>402</sup> See Friendly, *supra* note 392, at 764. Judge Friendly argues that "[s]tudy has led me to conclude that the differences [in the definitions of abuse of discretion] are not only defensible but essential. Some cases call for application of the abuse of discretion standard in a 'broad' sense and others in a 'narrow' one." *Id.*

<sup>403</sup> FED. R. CIV. P. 11(c)(3) ("When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed."); see also *supra* text accompanying notes 70-72, 125-26 (discussing substantive bias and potential positive effects of a findings requirement).

<sup>404</sup> The Sixth Circuit explicitly required findings. See, e.g., *In re Ruben*, 825 F.2d 977, 990-91 (6th Cir. 1987) (subsequent history omitted) ("[A] district judge faced with a sanction motion must make certain findings in determining that an award is appropriate. Careful analysis and discrete findings are required, no matter how exasperating the case."). The Fifth, Seventh, and Ninth Circuits, on the other hand, implicitly required findings as an aid to appellate review. See, e.g., *Lloyd v. Schlag*, 884 F.2d 409, 413 (9th Cir. 1990); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 882-83 (5th Cir. 1988) (en banc); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987) (subsequent history omitted). The case law under the 1983 Rule, therefore, probably still constitutes good law.

<sup>405</sup> See *supra* notes 28-49 and accompanying text. This is not to say that a lack of findings from the district courts was the sole cause of Rule 11's chilling effects. But if, as was argued above, the findings requirement was imposed at least in part to help combat those effects, then federal court experience under the de facto rule imposed by the pre-1993 case law indicates that such a requirement did not in fact fulfill its potential.

findings are necessary; the result has been that factual findings are rarely entered, and effective review is thwarted.”<sup>406</sup>

Unfortunately, there is a relative dearth of case law regarding the findings requirement imposed by the 1993 amendment.<sup>407</sup> This absence of case law could mean a couple of different things. First, it could mean that the district courts have been complying with the amendment and providing findings when they impose sanctions, thereby negating the need for any direction (or further direction, given the existence of the prior case law) from the federal appellate courts. The lack of case law could also mean that the federal appellate courts have allowed the practice alluded to by Judge Johnson under the 1983 version of Rule 11 to continue. If the former situation currently exists in practice, perhaps the findings requirement will actually play a meaningful part in reducing Rule 11’s chilling effects under the 1993 version of the Rule. But if the latter situation is the actual practice in the federal courts, then, obviously, it would be problematic because the findings requirement would not be helping to fulfill that objective. There is nothing in the case law to suggest, however, that federal court practice regarding the findings requirement has changed dramatically since Judge Johnson penned his comments.

#### c. Direction from the Federal Appellate Courts

The federal appellate courts play an important role in determining both how Rule 11 is to be applied by the federal district courts and the

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<sup>406</sup> Johnson, *supra* note 63, at 675 (footnote omitted).

<sup>407</sup> My research revealed three, possibly four, such cases. See, e.g., *Sakon v. Andreo*, 119 F.3d 109, 113 (2d Cir. 1997) (requiring findings to explain imposition of sanctions). The *Sakon* court stated that “it is imperative that the court explain its sanctions order ‘with care, specificity, and attention to the sources of its power’ . . . . [S]uch an award either without reference to any statute, rule, decision, or other authority, or with reference only to a source that is inapplicable will rarely be upheld.” *Id.* (citations omitted). See also *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 58 (2d Cir. 2000); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996); cf. *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 711 (7th Cir. 2001) (requiring the district court on remand to “state explicitly the evidence that it relies upon to determine the appropriateness, and, if necessary, the amount of the sanctions”). Notably, the Seventh Circuit also appears to require the district court to make findings when it denies Rule 11 sanctions, which is not explicitly required by the amended Rule. See, e.g., *In re Dorothy Generes*, 69 F.3d 821, 826-27 (7th Cir. 1995) (holding that the district court’s failure to explain its decision to impose Rule 11 sanctions constituted an abuse of discretion.); see also *FED. R. CIV. P.* 11(c)(3).

extent to which it is used.<sup>408</sup> Therefore, the purpose of this section is to get a sense of the direction being provided by the federal courts of appeals, as determined by the number of published versus unpublished opinions and whether there are any en banc decisions.

To state the obvious, federal district courts are bound by the opinions of the federal courts of appeals. But only published opinions provide binding precedents beyond the case in which they were originally decided.<sup>409</sup> The most significant published opinions are, of course, en banc opinions, because a majority of the entire membership of a court participates in the decision.<sup>410</sup> Consequently, the number of en banc decisions and the number of published cases relative to unpublished ones should provide some insight into how much guidance the federal circuit courts are providing to the district courts with respect to Rule 11.

Research for this Article did not reveal a single en banc Rule 11 decision by any of the six federal circuit courts of appeals studied for this Article.<sup>411</sup> Out of the forty-three appellate opinions collected for this Article, sixteen, or 37%, were unpublished; the remaining twenty-seven, or 63%, were published.

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<sup>408</sup> Yamamoto, *Case Management*, *supra* note 24, at 441 (reasoning that appellate review is "an important element of judicial efforts to clarify Rule 11 standards"); *see also* Wiggins, *supra* note 37, at 13 (noting that one of the reasons given by federal district court judges for increasing their use of Rule 11 was that "[t]he court of appeals has mandated [it] or I would rarely impose sanctions," but that, conversely, district court judges commented that one of the reasons for decreasing their use of Rule 11 was that "[t]here [was] no support from the court of appeals").

<sup>409</sup> Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 2000 A.L.R. 5th 17 (2000) ("The rules and holdings of many state and federal courts provide that unpublished opinions cannot be considered to have precedential effect."); *see also* 9th Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel."); 7TH CIR. R. 53.

<sup>410</sup> 5 AM. JUR. 2D *Appellate Review* § 894 (1995).

<sup>411</sup> In contrast, the Fifth, Seventh, and Ninth Circuits all issued en banc Rule 11 decisions with respect to the 1983 version of the Rule. *See* Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990) (en banc); Mars Steel Corp. v. Cont'l Bank, N.A., 880 F.2d 928 (7th Cir. 1989) (en banc); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc).



Of course, the numbers vary by circuit.<sup>412</sup> The Sixth and Ninth Circuits issued the most opinions (11), followed by the Second Circuit (7), the Fifth and Seventh Circuits (6), and then by the Third Circuit (2). What is particularly striking, however, is that of the eleven opinions rendered by the Sixth Circuit, only three of them were published. The Ninth Circuit published less than half of its opinions: Most of the circuits, with the possible exception of the Sixth and Ninth Circuits, however, appear to be trying to provide some Rule 11 guidance to the district courts.

#### d. Summary

The appellate case law shows: there are no en banc opinions; “abuse of discretion,” as the applicable standard of review, is not clearly defined or consistently applied; and the findings requirement is probably not being strictly enforced. While a large percentage of the appellate opinions collected here are published, there are still a significant number of unpublished opinions being issued by the federal appeals courts, which address important procedural issues under Rule 11. Indeed, as the discussion above shows, there are several inter and intracircuit conflicts with respect to important issues raised by the 1993 version of Rule 11,<sup>413</sup> and these conflicts are not limited to a given circuit court’s

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#### 412 PUBLISHED VERSUS UNPUBLISHED RULE 11 OPINIONS:

CIRCUIT	PUBLISHED	UNPUBLISHED
Second	7	0
Third	2	0
Fifth	6	0
Sixth	3	8
Seventh	5	1
Ninth	4	7

See generally Appendix 1.

<sup>413</sup> Given the intracircuit and intercircuit conflicts amongst the federal courts of appeals, it is noteworthy that the United States Supreme Court has yet to issue an opinion clarifying Rule 11 standards and/or procedures under the 1993 Rule. Under the 1983 version of Rule 11, the Court issued three major opinions, all within eight years of that Rule’s adoption. See *Bus. Guides, Inc. v. Chromatic Communications Enter., Inc.*, 498 U.S. 533 (1991) (holding that Rule 11 imposed an objective standard of reasonable inquiry on represented parties who signed pleadings, motions, or other papers); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (adopting abuse of discretion as the applicable standard of review for all aspects of a district court’s Rule 11 decision and holding that Rule 11 sanctions could be imposed *after* a case is voluntarily dismissed); *Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120, 124-128 (1989) (holding that Rule 11 sanctions could not be imposed on a law firm).

unpublished opinions.<sup>414</sup> Consequently, the direction provided by the federal appellate courts still appears to be somewhat limited.

### B. *The Federal District Courts*

A total of ninety-two district court cases were collected for this article.<sup>415</sup> An examination of these cases reveals that there appears to be greater consistency in Rule 11 motion practice at the district court level than in the federal appellate courts. But, unfortunately, like the federal appellate courts, the district court cases seem to reflect some of the same disturbing trends previously suggested in the appellate opinions.

#### 1. *The Rule 11 Motion*

With a few exceptions,<sup>416</sup> district courts in the Second, Third, Sixth, Seventh, and Ninth Circuits have all held that warning letters do not

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<sup>414</sup> See generally *supra* Part III.A.1-3.

<sup>415</sup> See Appendix 2.

<sup>416</sup> SECOND CIRCUIT: *Williams v. Perry*, No. 3:99-CV-00725-EBB, 2000 WL 341259, at \*6 (D. Conn. Feb. 23, 2000) (granting defendant's Rule 11 motion, despite the fact that defendant did not serve a separate Rule 11 motion and instead "sent a four page, single spaced, highly detailed letter to Plaintiff's counsel outlining the law of res judicata"); *Gray v. Millea*, 892 F. Supp. 432, 433 n.1 (N.D.N.Y. 1995) (granting defendants' Rule 11 motion, despite the fact that defendants did not serve a separate Rule 11 motion and instead sent plaintiff a letter "which outlined in great detail the numerous factual and legal infirmities in plaintiff's various positions and importuned plaintiff to withdraw his suit prior to the filing of motions or risk sanctions"). The district court in *Gray* stated that

In light of the . . . letter prepared by defendants' [sic] clarifying plaintiff's position, defendants' good faith request that plaintiff withdraw his claims before motions and so avoid sanctions, and the unnecessary expense borne by the defendants in prosecuting their summary judgment motion from that point onward, the Court finds "unusual circumstances" such that payment to defendants' [sic] of their attorney's fees and costs from the . . . date of that letter is appropriate.

*Gray*, 892 F. Supp. at 438 (emphasis added). Cf. *Galonsky v. Williams*, No. 96 CIV. 6207 (JSM), 1997 WL 759445, at \* 3 (S.D.N.Y. Dec. 10, 1997). In response to plaintiff's argument that sanctions should be denied because of the failure to satisfy Rule 11 requirements, the court stated that,

While this argument is technically correct, in this case it exalts form over function. [Plaintiff's counsel] received the notice of the defects in his pleading which the rule contemplates when defense counsel sent him letters outlining the deficiencies in a similar complaint at the direction of the District Judge in New Jersey.

*Id.* (emphasis added). Because defendant's motion in *Galonsky* appeared "technically barred" under Rule 11 for failure to satisfy the safe harbor provision, the district court

satisfy the separate motion requirement of Rule 11 and are therefore insufficient to trigger the safe harbor period under that Rule.<sup>417</sup> Indeed,

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issued an order to show cause and ultimately censured plaintiff's counsel under Rule 11 and awarded attorneys' fees under 28 U.S.C. § 1927. *Id.* at \*7.

NINTH CIRCUIT: *Ex rel. Eitel*, 35 F. Supp. 2d 1151 (D. Ariz. 1998). In *Eitel*, prior to filing his Rule 11 motion against the government, a party sent the government letter notices of its alleged violations. *Id.* at 1160. The government disputed whether Eitel complied with Rule 11's notice requirement. *Id.* The district court, however, concluded that, "[a]lthough the exact motion was not served on the government, the Court finds that the letters provided sufficient notice with respect to the allegations contained therein." *Id.* at 1160 n.7. The Rule 11 motion was ultimately denied on other grounds. *Id.* at 1162-63.

<sup>417</sup> SECOND CIRCUIT: *Gamla Enters. N. Am., Inc. v. Lunor-Brillen Design U. Vertriebs GmbH*, No. 98 Civ. 992 (MGC), 2000 WL 193120 (S.D.N.Y. Feb. 17, 2000) (letter insufficient); *accord* *Sears, Roebuck & Co. v. Sears Realty Co., Inc.*, 932 F. Supp. 393, 408 (N.D.N.Y. 1996) (rejecting plaintiff's argument "that the 'safe harbor' provision was satisfied because defendant[s] were] 'offered' on two occasions [by letter and during a pretrial conference before the court] the opportunity to withdraw their motion"). The district court in *Gamla Enterprises* stated that

There is no mention, however, in either the minutes of the pretrial conference . . . or in the . . . letter, that plaintiff would seek sanctions under Rule 11 if defendant[s] refused to withdraw their motion. Neither the letter nor the oral request to withdraw the motion constitute sufficient notice to defendants within the meaning of the 'safe harbor' provisions of Rule 11.

*Gamla Enters.*, 2000 WL 193120, at \*3. *See also* *Lancaster v. Zufle*, 170 F.R.D. 7 (S.D.N.Y. 1996) (declining to accept defendant's invitation to accept its warning letter as the equivalent of compliance with Rule 11's separate motion requirement).

THIRD CIRCUIT: *Farris v. County of Camden*, 61 F. Supp. 2d 307, 332 n.15 (D.N.J. 1999) ("[A]n informal notice, either by letter or other means, does not trigger the commencement of the 21 day [safe harbor] period.") (citation omitted); *Lopez v. Constantine*, Nos. 94 CIV. 5921 DAB SEG, 95 CIV 5915 DAB SEG, 1997 WL 793595, at \*2 (E.D. Pa. June 18, 1997); *Kleinpaste v. United States*, No. 97-884, 1997 U.S. Dist. LEXIS 22377, at \*3 (W.D. Pa. Dec. 19, 1997).

SIXTH CIRCUIT: *Miller v. Credit Collection Servs.*, 200 F.R.D. 379, 380-81 (S.D. Ohio 2000) (rejecting defendant's argument that "communications from its counsel to Plaintiff's counsel [in the form of a letter and oral conversation] constitute compliance with the safe harbor requirement of Rule 11(c)(1)(A)"). The district court stated that,

If the drafters of that Rule had deemed a letter suggesting that sanctions would be sought were sufficient, they could quite easily have used language to convey that intent, instead of that which was chosen . . . . [T]he courts have uniformly concluded that a letter from an attorney to opposing counsel, threatening to seek sanctions under Rule 11 if an allegedly offending paper is not withdrawn or modified, is not the functional equivalent of serving a motion for sanctions and that, therefore, such a letter does not constitute compliance with the safe harbor provision contained in Rule 11(c)(1)(A).

district courts in all six of the circuits surveyed here have denied Rule 11 sanctions where a separate Rule 11 motion was not actually served on the opposing party.<sup>418</sup> Significantly, the federal district courts also seem

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*Id.* at 381 (footnote omitted). See also *Two Men & a Truck/Int'l Inc. v. Two Men & a Truck/Kalamazoo, Inc.*, No. 5:94-CV-162, 1996 WL 740540, at \*2 (W.D. Mich. Oct. 16, 1996). The court in *Two Men & a Truck* stated that,

Although plaintiff's counsel requested defendants' counsel by letter on December 6, 1995, to withdraw the motion to modify the preliminary injunction, the 'safe harbor' period begins to run only upon service of the motion . . . . In fact, plaintiff's counsel should be expected to give this type of notice to defendants' counsel prior to preparing and serving a Rule 11 motion.

*Id.*

SEVENTH CIRCUIT: *Dearborn Fin. Servs. Corp. v. Heath*, No. 98CV5222, 1999 WL 1011860, at \*5 (N.D. Ill. Sept. 30, 1999) ("A warning letter does not trigger the safe harbor provision of Rule 11, and further may not substitute for formal service of the Rule 11 motion."); *accord* *Harding Univ. v. Consulting Servs. Group, L.P.*, 48 F. Supp. 2d 765, 770 (N.D. Ill. 1999).

NINTH CIRCUIT: *Kibbee v. City of Portland*, No. CV-98-675-ST, 2000 U.S. Dist. LEXIS 17205, at \*34 (D. Or. Oct. 12, 2000) ("A letter warning is not a motion.").

<sup>418</sup> SECOND CIRCUIT: See, e.g., *Ping He (Hai Nam) Co. v. Nonferrous Metals (U.S.A.), Inc.*, 187 F.R.D. 121, 123-124 (S.D.N.Y. 1999) (vacating order imposing Rule 11 sanctions for, among other things, failing to file a separate Rule 11 sanctions motion); *accord* *Tornheim v. Fed. Home Loan Mortgage Corp.*, 988 F. Supp. 279, 288 (S.D.N.Y. 1997); *Sears, Roebuck & Co.*, 932 F. Supp. at 407-08; *Lancaster*, 170 F.R.D. 7 ("[T]he Rule expressly requires the serving of a formal motion, . . . for by serving such a motion a movant itself certifies to its own compliance with Rule 11 . . . and thus places its adversary on notice."); *D'Orange v. Feely*, 877 F. Supp. 152, 160 (S.D.N.Y. 1995) (denying defendants' request for Rule 11 sanctions where defendants did not file a separate motion.); THIRD CIRCUIT: *Brunner v. AlliedSignal, Inc.*, 198 F.R.D. 612, 615 (D.N.J. 2001) (dismissing defendants' motion for Rule 11 sanctions, even though it complied with the safe harbor provision, because it was not made separately); *accord* *Clement v. Pub. Serv. Elec. & Gas Co.*, 122 F. Supp. 2d 551, 554-55 (D.N.J. 2000); FIFTH CIRCUIT: *Seal v. Gateway Cos. of Del.*, No. 01-1322, 2001 WL 1018362, at \*5-6 (E.D. La. Sept. 4, 2001) (denying plaintiff's request for Rule 11 sanctions which was included in her opposition to defendants' motion to dismiss); *accord* *Laughlin v. Falcon Operators, Inc.*, No. Civ.A. 00-1484, 2001 WL 474282, at \*1 (E.D. La. May 3, 2001); SIXTH CIRCUIT: *Miller v. Credit Collection Servs.*, 200 F.R.D. 379, 381 (S.D. Ohio 2000) ("[T]he language employed in the second sentence of Rule 11(c)(1)(A) clearly and expressly requires that the motion for sanctions be served."); *Simmons v. Daimler-Chrysler Corp.*, No. 99-CV-76093-DT, 2000 WL 424198, at \*4 (E.D. Mich. Mar. 13, 2000) (denying plaintiff's motion for Rule 11 sanctions for failing, among other things, to "make the attorney fee motion separately"); *accord* *Neighbors Concerned About Yacht Club Expansion v. Grosse Pointe Yacht Club*, No. 99-70325, 1999 U.S. Dist. LEXIS 8646, at \*30 (E.D. Mich. May 26, 1999) (denying defendant's motion); SEVENTH CIRCUIT: *Birch v. Kim*, 977 F. Supp. 926, 937 (S.D. Ind. 1997) ("[E]ven though the substance of Defendant's counterclaim is an assertion for sanctions under Rule 11, Defendant has failed to comply with the required form of such motion. Specifically, the rule directs the moving party to file a motion for sanctions separately from other requests or motions.") (citation omitted); *accord* *Israel Travel*

to strictly construe Rule 11's safe harbor provision and have denied Rule 11 sanctions where Rule 11 motions were filed in court before twenty-one days from service of the motion had elapsed.<sup>419</sup>

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Advisory Serv., Inc. v. Israel Identity Tours, Inc., No. 92 C 2379, 1994 U.S. Dist. LEXIS 751, at \*14 (N.D. Ill. Jan. 26, 1994); NINTH CIRCUIT: *Fat T, Inc. v. Aloha Tower Assoc.* Piers 7, 8, & 9, 172 F.R.D. 411, 415 (D. Haw. 1996) (denying plaintiff's request for Rule 11 sanctions because motion was not filed separately); *accord* *Dunn v. Pepsi-Cola Metro. Bottling Co.*, 850 F. Supp. 853, 856 n.4 (N.D. Cal. 1994) (denying defendant's request for sanctions where a separate motion was not filed, but also because the suit was not meant to harass or cause unnecessary delay or needless increase in the cost of litigation).

<sup>419</sup> SECOND CIRCUIT: *See, e.g.,* *Camprubi-Soms v. Aranda*, No. 00 Civ. 9626 (DLC), 2002 WL 10439, at \*1 (S.D.N.Y. Jan. 3, 2002) (denying cross-motions for Rule 11 sanctions by holding that the safe harbor provision "is strictly construed"); *accord* *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (SSM), 2001 WL 1154669, at \*3 (S.D.N.Y. Oct. 1, 2001) (denying plaintiff's motion); *R.B. Ventures v. Shane*, No. 91 Civ. 5678 (CSH), 2000 WL 1010400, at \*2 (S.D.N.Y. July 20, 2000) (denying defendant's motion); *Blanco v. Remington Hotel Corp.*, No. 96 Civ. 6306 (WK) EJCF, 1998 WL 66009, at \*2 (S.D.N.Y. Feb. 17, 1998) (denying cross-motions); *Bonondona v. Stat House, Inc.*, No. 94 Civ. 0788 (JES) (LB), 1997 WL 43614, at \*2-3 (S.D.N.Y. Feb. 4, 1997) (denying cross-motions); *Sears, Roebuck & Co.*, 932 F. Supp. at 407-08 (denying plaintiff's motion); *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449, 452 (E.D.N.Y. 1995) (denying defendant's motion and rejecting defendant's argument that it was not bound by Rule 11's safe harbor provision because the court had granted leave to move for sanctions and reasoning that "[t]he granting of such leave in no way was intended, nor could it, circumvent the amended provisions of Rule 11"); FIFTH CIRCUIT: *See, e.g.,* *Porter v. Milliken & Michael, Inc.*, No. 99-0199, 2001 WL 104769, at \*2 (E.D. La. Sept. 7, 2001) (denying defendant's motion); *accord* *Seal*, 2001 WL 1018362, at \*5-6 (denying plaintiff's motion); *Riley v. City of Jackson*, 2 F. Supp. 2d 864, 879-80 (S.D. Miss. 1997) (denying plaintiffs' motion); SIXTH CIRCUIT: *See, e.g.,* *Simmons v. Daimler-Chrysler Corp.*, No. 99-CV-76093-DT, 2000 WL 424198, at \*3-4 (E.D. Mich. Mar. 13, 2000) (denying plaintiff's motion); *Grosse Pointe Yacht Club*, 1999 U.S. Dist. LEXIS 8646, at \*30 (denying defendant's motion); *Allied Mech. Serv., Inc. v. Local 337 of the United Assoc. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indust.*, No. 4:98-CV-113, 1999 U.S. Dist. LEXIS 4654, at \*20 (W.D. Mich. Mar. 30, 1999) (denying defendant's motion); *Two Men and a Truck Int'l*, 1996 WL 740540, at \*1-2 (denying plaintiff's motion); SEVENTH CIRCUIT: *See, e.g.,* *Hartford Cas. Ins. Co. v. Theobald*, No. IP00-0325-C-M/S, 2001 WL 484181, at \*3 (S.D. Ind. Jan. 16, 2001) (denying defendants' motion); *Bryant v. Polston*, No. IP 00-1064-C-T/6, 2000 WL 1670938, at \*8 (S.D. Ind. Nov. 2, 2000) (denying plaintiff's motion); *Birch*, 977 F. Supp. at 937-38 (denying defendant's motion); *Religious Order of St. Matthew v. Brennan*, No. 3:92-CV-793 RM, 1995 WL 555102, at \*19 (N.D. Ind. June 8, 1995) (denying defendant's motion); *Israel Travel Advisory Serv., Inc.*, 1994 U.S. Dist. LEXIS 751, at \*15-16 (denying plaintiff's motion); NINTH CIRCUIT: *Kibbee*, 2000 U.S. Dist. LEXIS 17205, at \*32-35 (denying defendants' motion and stating that "FRCP 11 does not provide for a waiver of the 21-day 'safe harbor' requirement under any circumstances").

## 2. The Order to Show Cause

The federal district courts raised Rule 11 on their own initiative in nine out of the sample of ninety-two district court cases collected,<sup>420</sup> or in ten percent of the cases.<sup>421</sup> Orders to show cause were actually issued in seven of the nine cases.<sup>422</sup> In the other two cases, the federal district court issued no order at all.<sup>423</sup>

But what of due process? Recall that, according to the federal appellate courts, due process requires, at a minimum, that the party against whom sanctions is sought be given: (1) particularized notice of the conduct alleged to be sanctionable; (2) particularized notice of the authority or authorities under which sanctions are being sought; and (3) an opportunity to respond.<sup>424</sup> As a consequence, the federal appellate courts have tended to require the district courts to actually issue orders to show cause.<sup>425</sup> Clearly, in the two cases in which no order to show cause was issued at all, the sanctioned parties were not provided with

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<sup>420</sup> SECOND CIRCUIT: *Galonsky*, 1997 WL 759445; THIRD CIRCUIT: *Brunner*, 198 F.R.D. 612; *Clement*, 122 F. Supp. 2d 551; *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121 (D.N.J. 1998); FIFTH CIRCUIT: *Hicks v. Bexar County*, 973 F. Supp. 653 (W.D. Tex. 1997); *Toups v. Archer-Daniels-Midland Co.*, 155 F.R.D. 588 (S.D. Tex. 1994); SIXTH CIRCUIT: *Miller v. United States*, No. 5:96CV1237, 1998 WL 372340 (N.D. Ohio Feb. 6, 1998); SEVENTH CIRCUIT: *Cox v. Preferred Technical Group, Inc.*, 110 F. Supp. 2d 786 (N.D. Ind. 2000); *Lerch v. Boyer*, 929 F. Supp. 319 (N.D. Ind. 1996).

<sup>421</sup> Again, despite the fact that a considerably higher number of federal district court cases were collected for this Article (relative to the number of appellate court opinions), the sample size is still not large enough to generate *statistically* significant numbers. I am definitely aware of this limitation but include the numbers anyway because they are useful in *suggesting* trends in Rule 11 practice in the federal district courts.

<sup>422</sup> *Brunner*, 198 F.R.D. at 615; *Clement*, 122 F. Supp. 2d at 555; *Thomason*, 182 F.R.D. at 125; *Miller*, 1998 WL 372340, at \*2; *Galonsky*, 1997 WL 759445, at \*3; *Lerch*, 929 F. Supp. at 325.

<sup>423</sup> *Hicks*, 973 F. Supp. at 686 (concluding that there was a "wholesale lack of legal and factual support for plaintiff's civil rights claims . . ." and imposing Rule 11 sanctions by finding that "[t]he Court may sua sponte notice the propriety of the imposition of sanctions upon a party pursuant to Rule 11"); *Toups*, 155 F.R.D. at 591 (concluding that defendant's removal to the federal court "was patently frivolous and submitted solely to harass, cause unnecessary delay, and needlessly increase the cost of litigation" and ordering defendant to pay plaintiff \$1,000 as a Rule 11 sanction to cover plaintiff's costs in opposing defendant's removal to the federal district court).

<sup>424</sup> See *supra* notes 299-302 and accompanying text.

<sup>425</sup> See *supra* text accompanying notes 309-16.

any of the required notice, and, as a result, they were also deprived of a meaningful opportunity to respond.<sup>426</sup>

Of the remaining seven cases in which an order to show cause was issued, two did not include the actual order issued by the district courts,<sup>427</sup> only three appear to satisfy due process,<sup>428</sup> and the remaining

<sup>426</sup> Recall that the purpose of requiring such particularized notice is to make counsel (or the party) threatened with sanctions explicitly aware of the factors she must address if she is to avoid sanctions. Only if armed with this information, therefore, can a party respond intelligently to the court's concerns. See *supra* notes 299-302 and accompanying text.

<sup>427</sup> In both cases, the orders to show cause were issued prior to the opinion collected for this Article. See *Galonsky*, 1997 WL 759445, at \*3 (Second Circuit); *Brunner*, 198 F.R.D. at 613 (Third Circuit).

<sup>428</sup> THIRD CIRCUIT: *Clement v. Pub. Serv. Elec. & Gas Co.*, 122 F. Supp. 2d 551, 556 (D.N.J. 2000). The order to show cause stated that

Lorraine Harris, Esq., shall show cause before this Court on January 19, 2001 at 9:30 a.m. whether she has violated Federal Rule 11(b)(2) [regarding legal claims], and what sanctions, if any, should be imposed. Specifically, Ms. Harris shall show cause whether she conducted an "inquiry reasonable under the circumstances" that the claims she has asserted on behalf of Plaintiff in this case "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

*Id.* The order also set forth a briefing schedule. *Id.* The order to show cause issued here, therefore, put plaintiff's counsel on notice of the specific conduct that was alleged to be sanctionable, i.e., the legal claims asserted against defendants; informed her of the authority upon which the district court was relying in considering sanctions, i.e., Rule 11; and gave her a meaningful opportunity to respond. *Id.* Plaintiff's counsel's first response to the order was due fifteen days after the order issued, and her reply brief, if any, was due over two weeks after that. *Id.*; see also *Thomason v. Lehrer*, P.C., 182 F.R.D. 121, 125, 131 (D.N.J. 1998). In *Thomason*, the court stated that, with respect to the order to show cause it had previously issued,

On May 26, 1998, after recounting the procedural history of the action and relevant legal principles with respect to section 1983 actions . . . , I ordered Thomason to show cause: "why Count I of the Amended Complaint should not be dismissed for failure to state a claim upon which [relief] can be granted and why Counts II through IV should not be dismissed pursuant to 28 U.S.C. § 1367(c)(3) . . . . Also, having discussed why Thomason might be subject to sanctions and what 'sanctioning tools' the Court was contemplating, . . . I ordered Thomason to show cause: why sanctions should not be imposed against Charles L. Thomason, Esq. pursuant to (1) Rule 11 of the Federal Rules of Civil Procedure; (2) 28 U.S.C. § 1927; and (3) the Court's inherent powers."

*Id.* The order to show cause at issue here appears to have satisfied due process because it gave plaintiff notice of the specific conduct alleged to be sanctionable and the authorities

two seem to fall short of the due process requirements laid out by the federal circuit courts.<sup>429</sup> All told, therefore, the federal district courts

under which the district court was contemplating sanctions. *Id.* Whether a meaningful opportunity to respond was provided is less clear, but the opinion indicates that plaintiff did file a response to the district court's order to show cause. *Id.*

SEVENTH CIRCUIT: *Cox v. Preferred Technical Group, Inc.*, 110 F. Supp. 2d 786, 787, (N.D. Ind. 2000) (issuing "an oral order to show cause why [plaintiff] should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure for forcing a totally meritless case to trial"). The court rejected plaintiff's argument that the district court was required to enter a separate *written* order to show cause describing the objectionable conduct. *Id.* at 788-89. The court concluded that its oral order to show cause fully complied with Rule 11's requirements. *Id.* at 789. In support of its position, the court pointed out that, when it issued its oral order to show cause, it

specifically explained to [plaintiff] that he could be subjected to sanctions for presenting a case based on complete fabrications and not supported by any evidence whatsoever. This court also fully insured that [plaintiff] would have a full opportunity to respond to the order to show cause by requesting [his court appointed counsel] to represent [plaintiff] and prepare a written response as well as attend the sanctions hearing. Additionally, the court invited [plaintiff] to prepare his own explanation of why he continued to pursue his case and, when [plaintiff] was unable to attend the hearing scheduled for May 5, 2000, the court rescheduled the hearing to a date more convenient for [plaintiff].

*Id.* This oral order satisfies due process because it gave plaintiff specific information about the conduct alleged to be sanctionable and disclosed that sanctions were being considered under Rule 11 and plaintiff was given ample opportunity to respond. *Id.*

<sup>429</sup> SIXTH CIRCUIT: *Miller v. United States*, No. 5: 96CV1237, 1998 WL 372340, at \*1-2 (N.D. Ohio Feb. 6, 1998) (referring the case back to the magistrate judge for the sole purpose of holding "a post-judgment hearing at which Plaintiff must show cause why he should not be sanctioned [for bringing this action]"). On April 18, 1997, the magistrate judge issued an order to show cause, which provided that

the undersigned will conduct a hearing on the motions for sanctions and reimbursement of attorney fees and expenses beginning at 9:00 a.m. on Monday, June 2, 1997 . . . . At the hearing, Plaintiff should be prepared to show cause why he should not be sanctioned for bringing this action.

Further, in order to provide Plaintiff with every opportunity to be heard on the sanction motions. Plaintiff is granted leave of court until May 12, 1997, to file any written statement or argument as to why sanctions should not be imposed or to respond to the pending motions for sanctions. Any other party may file a response no later than May 27, 1997. At the June 2, 1997, hearing the undersigned will consider any written materials filed by any party in addition to the matters noted above.

*Id.* at \*2. First, despite the repeated references made by the magistrate judge to a sanctions motion or motions, there is nothing in the opinion, or in the original report and recommendation issued by this magistrate judge to indicate that such a motion, rather than the order to show cause, was ever filed or was pending. See *Miller v. Gallagher*, No. 5:



failed to satisfy due process in four of the nine instances, or 44% of the time, in which Rule 11 sanctions were raised on their own initiative.

Significantly, Rule 11 sanctions were imposed via these nine orders to show cause in six of the nine cases, or 67% of the time.<sup>430</sup> These numbers, however, are not complete. Recall that orders to show cause were also issued by the district courts in twelve of the forty-three circuit court opinions previously discussed.<sup>431</sup> Sanctions were imposed by the district courts in nine of these twelve cases.<sup>432</sup> Combining these numbers, therefore, reveals the following statistics: (1) orders to show cause were issued by the federal district courts in twenty-one out of one hundred and thirty-five cases collected for this Article, or in 16% of the

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96CV1237, 1996 WL 862462 (N.D. Ohio Dec. 17, 1996) (providing the original report and recommendations). One can only conclude, therefore, that the magistrate judge was referring to a "motion" brought by the court itself, i.e., via the order to show cause. Second, and more on point, the order to show cause issued by the magistrate judge did not comport with due process. While it certainly provided plaintiff with ample opportunity to respond to the order to show cause, it did not put plaintiff on notice of the specific conduct alleged to be sanctionable or the specific sanctioning authority under which sanctions were being sought or contemplated; indeed no sanctioning authority was even mentioned. Consequently, plaintiff was denied a meaningful opportunity to respond to the order to show cause.

SEVENTH CIRCUIT: *Lerch v. Boyer*, 929 F. Supp. 319, 325 (N.D. Ind. 1996). In *Lerch*, the court issued the following order to show cause after dismissing plaintiffs' complaint:

Pursuant to Rule 11, the plaintiffs are given thirty (30) days from the date of this Memorandum and Order within which to SHOW CAUSE why this court should not impose the costs and reasonable attorneys' fees incurred by former defendants the United States Bankruptcy Court, Robert E. Grant, Judge, and Assistant United States Attorney J. Philip Klingenger.

*Id.* Clearly, this order failed to satisfy due process—it did not specify the conduct alleged to be sanctionable or list a single sanctioning authority. Plaintiffs were therefore denied a meaningful opportunity to respond, notwithstanding the fact that they had thirty days within which to do so.

<sup>430</sup> SECOND CIRCUIT: *Galonsky*, 1997 WL 759445, at \*7 (censure); THIRD CIRCUIT: *Brunner*, 198 F.R.D. at 618 (admonition); *Thomason*, 182 F.R.D. at 121 (monetary sanctions); FIFTH CIRCUIT: *Hicks v. Bexar County*, 973 F. Supp. 653, 690 (W.D. Tex. 1997) (monetary sanctions); *Toups v. Archer-Daniels-Midland Co.*, 155 F.R.D. 588, 588 (S.D. Tex. 1994) (monetary sanctions); SIXTH CIRCUIT: *Miller*, 1998 WL 372340, at \*1 (monetary sanctions).

Order to show cause hearings were still pending in two of the remaining cases and Rule 11 sanctions were ultimately imposed via a Rule 11 motion, rather than the order to show cause, in the last of the nine cases. See, e.g., *Clement*, 122 F. Supp. 2d 551 (hearing pending); *Cox*, 110 F. Supp. 2d 786 (Rule 11 motion); *Lerch*, 929 F. Supp. 319 (hearing pending).

<sup>431</sup> See *supra* notes 342-43 and accompanying text.

<sup>432</sup> See *supra* note 344 and accompanying text.

cases; and (2) sanctions were imposed pursuant to the orders to show cause in fifteen out of the twenty-one cases, or 71% of the time.

These numbers are significant because they are consistent with findings made by others. Specifically, Professor Vairo has found that sua sponte orders to show cause are generally issued in approximately 14.5% of Rule 11 cases.<sup>433</sup> Perhaps more importantly, the AJS study concluded that “the rate of sanctions emerging from a judicial show cause order is far greater than the success rate of motions for sanctions: about 60% of the judicially-initiated Rule 11 formal activity leads to sanctions as compared with approximately 15% of the counsel-initiated motions.”<sup>434</sup>

### 3. Timing

Despite the fact that the timing of a Rule 11 motion or an order to show cause can have a tremendous impact on the effectiveness of the 1993 amendments to the Rule,<sup>435</sup> timing does not appear to be much of an issue in most federal district courts. A Rule 11 motion or order to show cause was filed after judgment in nineteen of the ninety-two district court cases collected for this Article,<sup>436</sup> or 21% of the time.

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<sup>433</sup> Simpson, *supra* note 22, at 505 (citing Georgene M. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures*, I-26 (Supp. 1991)).

<sup>434</sup> Marshall, *supra* note 10, at 952.

<sup>435</sup> See *supra* Part III.A.1.c., 2.b.

<sup>436</sup> ORDERS TO SHOW CAUSE: SIXTH CIRCUIT: Miller v. United States, No. 5: 96CV1237, 1998 WL 372340 (N.D. Ohio Feb. 6, 1998); SEVENTH CIRCUIT: Lerch v. Boyer, 929 F. Supp. 319 (N.D. Ind. 1996).

RULE 11 MOTIONS: SECOND CIRCUIT: Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 99 Civ. 10175(JSH), 2001 WL 1154669 (S.D.N.Y. Oct. 1, 2001); Kron v. Moravia Cent. Sch. Dist., No. 5:98-CV-1876 (FJS/GJD), 2001 WL 536274 (N.D.N.Y. May 3, 2001); R.B. Ventures v. Shane, No. 91 Civ. 5671 (CSH), 2000 WL 1010400 (S.D.N.Y. July 20, 2000); Kahre-Richardes Family Found., Inc. v. Vill. of Baldwinville, New York, 953 F. Supp. 39 (N.D.N.Y. 1997); Lancaster v. Zufle, 170 F.R.D. 7 (S.D.N.Y. 1996); Binghamton Masonic Temple, Inc. v. Bares, 168 F.R.D. 121 (N.D.N.Y. 1996); Gray v. Millea, 892 F. Supp. 432 (N.D.N.Y. 1995); THIRD CIRCUIT: Hockley v. Shan Enter. Ltd. P'ship, 19 F. Supp. 2d 235 (D.N.J. 1998); Progress Fed. Sav. Bank v. Lenders Ass'n, No. Civ. A. 99-7425, 1996 WL 57942 (E.D. Pa. Feb. 12, 1996); SEVENTH CIRCUIT: Cox v. Preferred Technical Group, Inc., 110 F. Supp. 2d 786 (N.D. Ind. 2000); Northlake Mktg. & Supply, Inc. v. Glaverbel, S.A., 194 F.R.D. 633 (N.D. Ill. 2000); Harding Univ. v. Consulting Serv. Group, L.P., 48 F. Supp. 2d 765 (N.D. Ill. 1999); Smith v. CB Commercial Real Estate Group, 947 F. Supp. 1282 (S.D. Ind. 1996); Sethness-Greenleaf, Inc. v. Green River Corp., Nos. 89C 9203, 91C4373, 1995 U.S. Dist LEXIS 13796 (N.D. Ill. Sept. 20, 1995); Gazouski v. Belvidere, No. 93C 20157, 1995 WL 149438 (N.D. Ill. Apr. 3, 1995); NINTH CIRCUIT: Truesdell v. S. Cal. Permanente Med. Group, 151 F. Supp. 2d 1174

Neither of the two order to show cause cases discussed the fact that the orders were issued after final judgment had been entered. With the exception of district courts in two circuits, the fact that a Rule 11 motion was filed *after* final judgment simply was not an issue addressed by most district courts; it was not raised or discussed in these opinions at all.<sup>437</sup> District courts in the Third Circuit denied Rule 11 motions filed after final judgment because they were untimely, but they did so without any mention of the Third Circuit's supervisory rule.<sup>438</sup> Interestingly enough,<sup>439</sup> district courts in the Seventh Circuit also denied Rule 11 motions filed after final judgment as untimely,<sup>440</sup> but these courts, in keeping with the Seventh Circuit's position in *Divane v. Krull*, acknowledged that Rule 11 motions could be filed after final judgment.<sup>441</sup> Unlike the Seventh Circuit in *Divane*, however, a couple of district courts in this federal circuit impose a bright-line timeliness standard ranging from thirty to ninety days for filing a Rule 11 motion after final judgment, based on prior Seventh Circuit case law and local rules of court.<sup>442</sup>

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(C.D. Cal. 2001); *Religious Tech. Ctr. v. Gerbode*, No. 93-2226AWT, 1994 WL 228607 (C.D. Cal. June 23, 1994).

<sup>437</sup> Cases from the district courts in five of the six circuits examined involved orders to show cause or a Rule 11 motion filed after final judgment. Those circuits are the Second, Third, Sixth, Seventh, and Ninth. Significantly, four of the five circuits, namely, the Third, Fifth, Sixth, and Ninth, have essentially interpreted the 1993 version of Rule 11 to require that Rule 11 motions be filed prior to final judgment or be denied as untimely. See *supra* Part III.A.1.c.

<sup>438</sup> *Hockley*, 19 F. Supp. 2d at 240 (explicitly trying to give effect to the purposes behind the safe harbor provision and stating that "[i]mplicit in the amended Rule 11 is the policy provision that, absent clearly abusive behavior akin to contempt of court, a party will always have the chance to withdraw the offending papers it has submitted"); *Progress Fed. Sav. Bank*, 1996 WL 57942, at \*2 (noting that the safe harbor provision constituted a major element of the new Rule 11's structure and stating with respect to that provision that "the text reflects a purposeful and delicate balancing of policy concerns").

<sup>439</sup> Recall that the Seventh Circuit is the only circuit that has addressed the timing issue that has refused to adopt a per se Rule regarding *when* a Rule 11 motion should be filed. See *supra* text accompanying notes 278-86. Instead, that appellate court has left the timing issue to the discretion of the district courts. It appears that at least some of the district courts in the Seventh Circuit have adopted a per se timeliness rule.

<sup>440</sup> See *Northlake Mktg.*, 194 F.R.D. at 633; *Harding Univ.*, 48 F. Supp. 2d at 765; *Smith*, 947 F. Supp. at 1282; *Gazouski*, 1995 WL 149438; *Sethness-Greenleaf, Inc.*, 1995 U.S. Dist LEXIS 13796.

<sup>441</sup> See *infra* note 442.

<sup>442</sup> *Northlake Mktg.*, 194 F.R.D. at 634-35 (interpreting the Seventh Circuit's *Divane v. Krull* opinion as reaffirming the timeliness standard established in a pre-1993 case called *Kaplan*

#### 4. Troubling Trends

Several of the troubling trends that were discussed in conjunction with the federal appellate court cases actually stem from Rule 11 practice in the federal district courts, namely, the emphasis on monetary sanctions and the uses of the order to show cause procedure. More specifically, it is the district courts that decide in the first instance whether to issue orders to show cause and for what purpose and what kind of Rule 11 sanction to impose. Perhaps it is therefore not surprising that these troubling trends continue, and are more pronounced, in the district court cases collected for this Article.<sup>443</sup>

##### a. Using Orders to Show Cause to Sidestep Rule 11 Motion Requirements

A particularly troubling use of the order to show cause is the apparent use of that procedure to sidestep the Rule 11 motion requirements. In other words, it appears that orders to show cause are being issued in situations where the Rule 11 motion requirements have not been satisfied *specifically because* those requirements have not been met.

Here are some numbers. Out of the ninety-two cases collected here, the federal district courts issued a total of nine orders to show cause.<sup>444</sup> Four of the nine orders, or 44% of them, were issued in circumstances in

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*v. Zenner*, 956 F.2d 149, 151 (7th Cir. 1992), “which directed that any Rule 11 motions should be filed ‘as soon as practicable after discovery of a Rule 11 violation,’” and according to the district court, *Kaplan* also imposed a “bright-line component of the timeliness test,” which would require all Rule 11 motions to be filed within 90 days of final judgment, *id.*); *Smith*, 947 F. Supp. at 1284. The court in *Smith* took the position that

The Seventh Circuit [in *Kaplan v. Zenner*] has established the “outer parameter” of timeliness for purposes of a Rule 11 motion [to be] the deadline under local rules for filing a bill of costs or a request for attorney fees[; and] . . . the latest a motion for sanctions could be filed was either 30 days or 90 days after entry of final judgment, depending on whether costs or attorney fees were being sought.

*Smith*, 947 F. Supp. at 1284 (citations omitted).

<sup>443</sup> The numbers that follow are simply *suggestive* of a trend in the federal district courts; they are not statistically significant, given the relatively small number of cases collected for this article.

<sup>444</sup> See *supra* note 420.

which the Rule 11 motion requirements were not satisfied.<sup>445</sup> At the appellate level, four of the twelve cases at least raised the issue of whether it was proper to use an order to show cause to sidestep the Rule 11 motion requirements.<sup>446</sup> Putting these numbers together yields the following results: (1) out of the one hundred and thirty-five cases collected, only twenty-one orders to show cause, or 16%, were issued by the federal district courts; (2) of the twenty-one orders to show cause issued, however, four, or 19% of them, appear to have been issued specifically because the Rule 11 motion requirements were not satisfied; (3) in another four cases of the twenty-one in which orders to show cause were issued, or 19%, using an order to show cause specifically to get around the motion requirements was raised as an issue; and, therefore, (4) the appropriate use of an order to show cause was at least raised in eight of the twenty-one order to show cause cases, or in 38% of these cases.

b. Orders to Show Cause and Attorneys' Fees

Again, the federal district courts raised Rule 11 on their own initiative in 10% of the ninety-two district court cases collected, or in nine

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<sup>445</sup> SECOND CIRCUIT: *Galonsky v. Williams*, No. 96 Civ. 6207(JSM), 1997 WL 759445, \*3 (S.D.N.Y. Dec. 10, 1997) (stating that, because defense counsel's motion appeared to be technically barred for failing to follow the safe harbor provision of Rule 11 but counsel's conduct appeared to merit sanctions, the court gave counsel notice it was considering imposing sanctions on its own motion, ultimately censuring plaintiff's counsel under Rule 11 and awarding \$15,000 in attorneys' fees pursuant to § 1927); THIRD CIRCUIT: *Brunner v. AlliedSignal, Inc.*, 198 F.R.D. 612, 615, 618 (D.N.J. 2001) (issuing an order to show cause against plaintiff's counsel and ultimately admonishing him on the record as a Rule 11 sanction, even though defendants' Rule 11 motion was dismissed for failure to comply with the separate motion requirement because the district court was convinced that plaintiff's counsel's conduct had in fact violated Rule 11); *Clement v. Pub. Serv. Elec. & Gas Co.*, 122 F. Supp. 2d 551, 555 (D.N.J. 2000) (denying the defendants' motion for sanctions because they failed to comply with the separate motion requirement of Rule 11(c)(1)(A), but issuing an order to show cause with the opinion, which directed plaintiff's counsel to show cause whether she had violated Rule 11(b)(2) and what sanctions, if any, should be imposed); SEVENTH CIRCUIT: *Lerch v. Boyer*, 929 F. Supp. 319, 321, 325 (N.D. Ind. 1996) (concluding, after the United States Bankruptcy Court and an Assistant United States Attorney were dismissed as defendants and after the remaining defendants had been dismissed and had moved for Rule 11 sanctions, that, because neither the United States Bankruptcy Court nor the Assistant United States Attorney "filed formal motions for Rule 11 sanctions prior to their termination as parties to this action . . . , the plaintiffs are hereby ordered to show cause within thirty (30) days why this court should not impose costs and reasonable attorneys' fees pursuant to the affidavits provided by [defense counsel]").

<sup>446</sup> See *supra* text accompanying notes 348-63.

cases.<sup>447</sup> Rule 11 sanctions were awarded pursuant to six of the nine orders to show cause, or 67% of the time.<sup>448</sup> Of the six orders resulting in sanctions, four of them, or 67%, awarded attorneys' fees.<sup>449</sup> With respect to the appellate cases, nine of the twelve orders to show cause issued by the federal district courts resulted in an award of attorneys' fees.<sup>450</sup> Combining these numbers, therefore, yields the following results: (1) out of the one hundred and thirty-five cases collected, a total of twenty-one orders to show cause, or 16%, were issued by the federal district courts; (2) of the twenty-one orders to show cause, sanctions were imposed pursuant to eighteen of them, or 86% of the time; and (3) of the eighteen sanctions awards, thirteen, or 72% of them, imposed attorneys' fees. These figures are significant, of course, because Rule 11 precludes the federal district courts from awarding monetary sanctions in the form of attorneys' fees when acting upon their own initiative.<sup>451</sup>

### c. Emphasis on Monetary Sanctions

The district court case law collected for this Article makes it very clear that monetary sanctions in the form of attorneys' fees are still the sanction of choice under Rule 11. This point is underscored by statements made by federal district court judges and also by the

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<sup>447</sup> See *supra* note 420 and accompanying text.

<sup>448</sup> See *supra* note 430 and accompanying text.

<sup>449</sup> THIRD CIRCUIT: *Thomason v. Lehrer*, P.C., 182 F.R.D. 121, 122 (D.N.J. 1998) (ordering plaintiff to pay a \$2,000 "fine"—"1,000 to be paid directly to [defendant] and \$1,000 to be deposited into the Court's Registry"); FIFTH CIRCUIT: *Hicks v. Bexar County, Texas*, 973 F. Supp. 653, 690, 691 (W.D. Tex. 1997) (awarding defendants their entire amount of attorneys' fees and costs actually incurred "in defending against plaintiff's claims herein," with the amount to be established by affidavits to be filed with the court); *Toups v. Archer-Daniels-Midland Co.*, 155 F.R.D. 588, 591 (S.D. Tex. 1994) (ordering defendant to pay plaintiff \$1,000 "for the Plaintiff's reasonable costs and expenses, including attorney's fees, in opposing [the] removal"); SIXTH CIRCUIT: *Miller v. United States*, No. 5:96CV1237, 1998 WL 372340, at \*5 (N.D. Ohio Feb. 6, 1998) (ordering plaintiff to pay a total of \$5,000 in attorneys' fees to be apportioned between four defendants).

<sup>450</sup> See *supra* note 344 and accompanying text.

<sup>451</sup> The relevant portion of Rule 11 provides:

Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, or an order to pay a penalty into court, or, *if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.*

FED. R. CIV. P. 11(c)(2) (emphasis added); see also *supra* notes 99-100 and accompanying text.

numbers. For example, a federal district judge sitting in the Southern District of New York stated,

The Court has the discretion to fashion an appropriate sanction for a Rule 11 violation. The critical consideration in exercising this discretion is that the policy underlying Rule 11 is to "sanction" rather than to "reimburse[ ]." . . . However, the typical sanction imposed is the payment of the other party's reasonable attorneys' fees which were incurred as a result of the violation.<sup>452</sup>

Another federal judge, sitting in the Central District of California stated that "Rule 11(c)(1)(A) now makes it discretionary with the court as to whether or not to award attorneys' fees to the prevailing party 'incurred in presenting or opposing the motion.' The rule does not require the presence of any exceptional circumstances for the award of such fees, but only that the award be 'warranted.'"<sup>453</sup>

Of the ninety-two district court cases collected, a total of ninety-seven Rule 11 motions were filed,<sup>454</sup> twenty-two of which were granted.<sup>455</sup> So, a Rule 11 motion was granted in 23% of the cases in

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<sup>452</sup> *Howard v. Klynveld Peat Marwick Coedeler*, 977 F. Supp. 654, 667 (S.D.N.Y. 1997) (alteration in original) (citations omitted).

<sup>453</sup> *Religious Tech. Ctr. v. Gerbode*, No. 93-2226AWT, 1994 WL 228607, at \*4 (C.D. Cal. May 2, 1994) (footnote omitted).

<sup>454</sup> See Appendix 3.

<sup>455</sup> SECOND CIRCUIT: *Williams v. Perry*, No. 3:99-CV-00725EBB, 2000 WL 341259 (D. Conn. Feb. 23, 2000); *Howard*, 977 F. Supp. 654; *Kahre-Richard Family Found., Inc. v. Village of Baldwinsville*, New York, 953 F. Supp. 39 (N.D.N.Y. 1997); *Chauvet v. Local 1199 Drug Hospital, & Healthcare Employees Union*, Nos. 96 Civ. 2934(SS), 96 Civ. 4622(SS), 1996 WL 665610 (S.D.N.Y. Nov. 18, 1996); *Wright v. Wilson Elser Moskowitz Edelman & Dicker*, No. 95 CIV 7970 (MGC), 1996 WL 447773 (S.D.N.Y. Aug. 8, 1996); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121 (N.D.N.Y. 1996); *O'Brien v. Alexander*, 898 F. Supp. 162 (S.D.N.Y. 1995); *Gray v. Millea*, 892 F. Supp. 432 (N.D.N.Y. 1995); THIRD CIRCUIT: *Lal v. Borough of Kennett Square*, 935 F. Supp. 570 (E.D. Pa. 1996); *Watson v. City of Salem*, 934 F. Supp. 643 (D.N.J. 1995); *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994); FIFTH CIRCUIT: *Muhammad v. Louisiana*, Nos. Civ., A. 99-3472, Civ. A. 99-2694, 2000 U.S. Dist. LEXIS 18807 (E.D. La. Dec. 21, 2000); *Tolbert v. Dallas Area Rapid Transit*, No. CA3-96-CV-0428-R, 1997 WL 135606 (N.D. Tex. Mar. 18, 1997); *Prewitt v. Alexander*, 173 F.R.D. 438 (N.D. Miss. 1996); SIXTH CIRCUIT: *Kratage v. Charter Township of Commerce*, 926 F. Supp. 102 (E.D. Mich. 1996); SEVENTH CIRCUIT: *Cox v. Preferred Technichal Group, Inc.*, 110 F. Supp. 2d 786 (N.D. Ind. 2000); *Smith v. Prudential Ins. Co. of Am.*, No. 98C5903, 2000 WL 549483 (N.D. Ill. May 1, 2000); *Cooper v. Chicago Transit Auth.*, No. 95 C 2616, 1997 U.S. Dist.

which one was filed. As previously noted, sanctions were also imposed in six out of the nine orders to show cause cases.<sup>456</sup> Together, therefore, sanctions were imposed by the federal district courts in twenty-eight of the ninety-two cases. This means that sanctions were imposed in 30% of all the cases. Significantly, however, monetary sanctions *in the form of attorneys' fees* were imposed in twenty-five of these twenty-eight cases.<sup>457</sup>

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LEXIS 5299 (N.D. Ill. Apr. 14, 1997); *Vildaver v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 94 C 3041, 94 C 3413, 1997 WL 7562 (N.D. Ill. Jan. 2, 1997); *Lerch v. Boyer*, 929 F. Supp. 319 (N.D. Ind. 1996); NINTH CIRCUIT: *Truesdell v. S. Cal. Permanente Med. Group*, 151 F. Supp. 2d 1174 (C.D. Cal. 2001); *Religious Tech. Ctr.*, 1994 WL 228607.

<sup>456</sup> See *supra* note 430 and accompanying text.

<sup>457</sup> ON MOTION—SECOND CIRCUIT: *Williams*, 2000 WL 341259, at \*7 (ordering plaintiff's counsel to pay defendant's attorneys' fees and costs incurred in defending the action, with the amount to be determined after defense counsel filed a fee application); *Howard*, 977 F. Supp. at 667 (sanctioning plaintiff's counsel in an amount to be determined after defense counsel "submit[s] to [the] Court detailed billing records reflecting the work expended on the instant motion so that an appropriate sanction award may be established"); *Kahre-Richardes Family Found., Inc.*, 953 F. Supp. at 42-43 (awarding a total of \$9,892.10 in attorneys' fees and making plaintiffs responsible for half, or \$4,946.05, pursuant to 42 U.S.C. § 1988 and plaintiffs' counsel responsible for the other half, or \$4,946.05, pursuant to Rule 11); *Wright*, 1996 WL 447773, at \*4 (imposing Rule 11 sanctions against defense counsel and his law firm, as well as sanctioning defense counsel under 28 U.S.C. § 1927 in an amount to be determined after plaintiff's counsel "submit[s] a statement describing the costs, expenses, and attorneys' fees reasonably incurred because of defendants' and counsel's sanctioned conduct"); *Binghamton Masonic Temple, Inc.*, 168 F.R.D. at 128-29 (holding both of plaintiff's counsel jointly and severally liable to defense counsel for his "defense of Plaintiff's claims, the Plaintiff's Rule 59 motion . . . , and the Defendants' prosecution of their Rule 11 claim," with total fees and costs awarded amounting to \$13,153.10); *O'Brien*, 898 F. Supp. at 176 (sanctioning plaintiff's counsel a total of \$1,500, of which \$750 was "to be paid to the Clerk of the Court and \$750 . . . to be paid to defendants"); *Gray*, 892 F. Supp. at 439 (ordering plaintiff's attorney to pay \$22,374.69 in attorneys' fees and expenses for all defendants from the date that plaintiff received a warning letter from defense counsel up to and including the date that defendants' motions for summary judgment were heard); THIRD CIRCUIT: *Lal*, 935 F. Supp. at 578 (ordering plaintiff "to pay the reasonable attorneys [sic] fees and costs incurred by [all defendants] in defending this lawsuit," with defendants ordered to submit affidavits detailing their fees, as well as imposing a \$1,500 fine to be paid to the court, representing "\$100 for each of the 15 defendants seeking sanctions") (emphasis added); *Watson*, 934 F. Supp. at 665 (requiring plaintiff's counsel to pay "[d]efendants for the reasonable costs and attorney's fees incurred as a result of the institution of this lawsuit" and ordering defendants to submit affidavits detailing fees and costs); *Kramer*, 156 F.R.D. at 111 (ordering plaintiff, an attorney in an underlying action, to pay defendants \$70,289.00 in attorneys' fees and costs under both Rule 11 and 28 U.S.C. § 1927 and imposing other sanctions, including dismissing the complaint, referring the matter for disciplinary proceedings, and referring the matter for criminal investigation); FIFTH CIRCUIT: *Muhammad*, 2000 U.S. Dist. LEXIS 18807, at \*11 (ordering plaintiff's counsel to pay defendants attorneys' fees and costs incurred in defending against plaintiffs' claims and ordering defendants to file a statement of fees and costs); *Tolbert*, 1997 WL 135606, at \*4



In other words, the federal district courts resorted to imposing monetary sanctions in the form of attorneys' fees in 89% of the cases in which sanctions were granted. The awards ranged from lows of \$500, \$750, and \$825.50 to highs of \$70,289, \$80,917, and even \$105,149.79.<sup>458</sup> It was also not uncommon for the district courts to award *all* of the "reasonable" attorneys' fees and costs incurred in an entire litigation. In fact, out of

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(requiring pro se plaintiff to pay \$825.50 in monetary sanctions to defendant); *Prewitt*, 173 F.R.D. at 440, 441 (determining that "the appropriate form of Rule 11 sanctions in this matter is an award of attorney's fees and case expenses in favor of each of the defendants who have requested such an award" and ordering pro se civil rights plaintiff, a licensed attorney, to pay a total of \$49,468.75); SIXTH CIRCUIT: *Kratage*, 926 F. Supp. at 106 (ordering plaintiffs to pay \$5,000, "representing the total amount of reasonable attorney fees and costs incurred by the defendants in connection with the defense of this and previous actions" and enjoining plaintiffs "from filing any future civil lawsuit based upon or arising out of any of the legal or factual claims alleged in this action and the actions underlying it") (emphasis added); *Ortman v. Thomas*, 906 F. Supp. 416, 424 (E.D. Mich. 1995) (ordering plaintiff to "pay a monetary sanction in the amount of \$24,809.99, representing the total amount of reasonable attorney fees and costs incurred by the defendants in connection with the defense of this action") (emphasis added); SEVENTH CIRCUIT: *Cox*, 110 F. Supp. 2d at 791 (ordering plaintiff to pay a total of \$80,917.00 to defendant in attorneys' fees for "forcing the case to trial"); *Smith*, 2000 WL 549483 at \*6 (ordering plaintiff to pay \$500); *Cooper*, 1997 U.S. Dist. LEXIS 5299, at \*8 (ordering plaintiffs' counsel to pay defendants all of their "attorneys' fees and costs attributable to the defense of this lawsuit," totalling \$105,149.78 in fees and costs); *Vildaver*, 1997 WL 7562, at \*3 (ordering plaintiffs' counsel to pay defense counsel a total of \$54,742.07 in attorneys' fees and costs); NINTH CIRCUIT: *Truesdell*, 151 F. Supp. 2d at 1191 (ordering plaintiffs' counsel to pay defendant \$4,945 as reasonable attorneys' fees); *Religious Tech. Ctr.*, 1994 WL 228607, at \*5 (holding plaintiff's counsel and her law firm jointly and severally liable to pay defendants \$8,887.50 "as partial reimbursement for attorneys' fees incurred in defending against the amended complaint," as well as making plaintiff's counsel and her firm jointly and severally liable to pay a \$8,887.50 fine into court).

VIA ORDERS TO SHOW CAUSE-THIRD CIRCUIT: *Thomason v. Lehrer, P.C.*, 182 F.R.D. 121, 122 (D.N.J. 1998) (ordering the district court plaintiff to pay a \$2,000 "fine" with "1,000 to be paid directly to [defendant] and \$1,000 to be deposited into the Court's Registry . . ."); FIFTH CIRCUIT: *Hicks v. Bexar County, Texas*, 973 F. Supp. 653, 690 (W.D. Tex. 1997) (awarding defendants their entire amount of attorneys' fees and costs actually incurred "in defending against plaintiff's claims herein," with the amount to be established by affidavits to be filed with the court); *Toups v. Archer-Daniels-Midland Co.*, 155 F.R.D. 588, 591 (S.D. Tex. 1994) (ordering defendant to pay plaintiff \$1,000 "for the Plaintiff's reasonable costs and expenses, including attorney's fees, in opposing this removal"); SIXTH CIRCUIT: *Miller v. United States*, No. 5:96CV1237, 1998 WL 372340, at \*5 (N.D. Ohio Feb. 6, 1998) (ordering plaintiff to pay a total of \$5,000 in attorneys' fees to be apportioned between four defendants).

<sup>458</sup> LOWS-SEVENTH CIRCUIT: *Smith*, 2000 WL 549483, at \*6 (\$500); SECOND CIRCUIT: *O'Brien*, 898 F. Supp. at 176 (\$750); FIFTH CIRCUIT: *Tolbert*, 1997 WL 135606, at \*4 (\$825.50).

HIGHS-THIRD CIRCUIT: *Kramer* 156 F.R.D. at 111 (\$70,289); SEVENTH CIRCUIT: *Cox*, 110 F. Supp. 2d at 791 (\$80,917); *Cooper*, 1997 U.S. Dist. LEXIS 5299 (\$105,149.78).

the twenty-five cases awarding monetary sanctions in the form of attorneys' fees, fourteen of them, or 56%, made just such an award.<sup>459</sup>

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<sup>459</sup> ON MOTION—SECOND CIRCUIT: *Williams*, 2000 WL 341259, at \*7 (ordering plaintiff's counsel to pay defendant's attorneys' fees and costs incurred in defending the action in an amount to be determined after defense counsel filed a fee application); *Binghamton Masonic Temple, Inc.*, 168 F.R.D. at 128-29 (holding both of plaintiff's counsel jointly and severally liable to defense counsel for his "defense of Plaintiff's claims, the Plaintiff's Rule 59 motion . . . , and the Defendants' prosecution of their Rule 11 claim," with total fees and costs awarded by the court amounting to \$13,153.10); *Gray*, 892 F. Supp. at 439 (ordering plaintiff's attorney to pay \$22,374.69 in attorneys' fees and expenses for all defendants from date that plaintiff received a warning letter from defense counsel up to and including date that defendants' motions for summary judgment were heard); THIRD CIRCUIT: *Lal*, 935 F. Supp. at 578 (ordering plaintiff "to pay the reasonable attorneys [sic] fees and costs incurred by [all defendants] in defending this lawsuit," with defendants ordered to submit affidavits detailing their fees, as well as imposing a \$1,500 fine to be paid to the court, representing "\$100 for each of the 15 defendants seeking sanctions") (emphasis added); *Watson*, 934 F. Supp. at 665 (ordering plaintiff's counsel to pay "[d]efendants for the reasonable costs and attorney's fees incurred as a result of the institution of this lawsuit" and ordering defendants to submit affidavits detailing fees and costs) (emphasis added); *Kramer*, 156 F.R.D. at 111 (ordering plaintiff, an attorney in an underlying action, to pay defendants \$70,289.00 in attorneys' fees and costs under both Rule 11 and 28 U.S.C. § 1927, "due to the filing of his Complaint," and imposing other sanctions including dismissing the complaint, referring the matter for disciplinary proceedings, and referring the matter for criminal investigation) (emphasis added); FIFTH CIRCUIT: *Muhammad*, 2000 U.S. Dist. LEXIS 18807, at \*11 (ordering plaintiff's counsel to pay defendants their attorneys' fees and costs incurred in defending against plaintiffs' claims and ordering defendants to file a statement of fees and costs); *Prewitt*, 173 F.R.D. at 440 (determining that "the appropriate form of Rule 11 sanctions in this matter is an award of attorney's fees and case expenses in favor of each of the defendants who have requested such an award" and ordering the pro se civil rights plaintiff, a licensed attorney, to pay a total of \$49,468.75); SIXTH CIRCUIT: *Kratage*, 926 F. Supp. at 106 (ordering plaintiffs to pay \$5,000, "representing the total amount of reasonable attorney fees and costs incurred by the defendants in connection with the defense of this and previous actions" and enjoining plaintiffs "from filing any future civil rights lawsuit based upon or arising out of any of the legal or factual claims alleged in this action and the actions underlying it") (emphasis added); *Ortman*, 906 F. Supp. at 424 (ordering plaintiff to "pay a monetary sanction in the amount of \$24,809.99, representing the total amount of reasonable attorney fees and costs incurred by the defendants in connection with the defense of this action") (emphasis added); SEVENTH CIRCUIT: *Cox*, 110 F. Supp. 2d at 791 (ordering plaintiff to pay a total of \$80,917.00 to defendant as their reasonable attorneys' fees for "forcing the case to trial"); *Cooper*, 1997 U.S. Dist. LEXIS 5299, at \*8 (ordering plaintiffs' counsel to pay defendants all of their "attorneys' fees and costs attributable to the defense of this lawsuit," totalling \$105,149.78 in fees and costs); *Vildaver*, 1997 WL 7562, at \*3 (ordering plaintiffs' counsel to pay defense counsel a total of \$54,742.07 in attorneys' fees and costs, representing all of the reasonable attorney's fees that defense counsel incurred in defending the case).

VIA ORDERS TO SHOW CAUSE—FIFTH CIRCUIT: *Hicks*, 973 F. Supp. at 690-91 (ordering pro se civil rights plaintiff to pay defendants their entire amount of attorneys' fees and costs actually incurred "in defending against plaintiff's claims herein" in an amount to be established by affidavits to be filed with the court).

Perhaps more significantly for purposes of this paper, of the fourteen district court cases that awarded *all* litigation costs as an “appropriate” Rule 11 sanction, all fourteen were imposed against plaintiffs or their counsel,<sup>460</sup> and eight of the fourteen involved civil rights claims.<sup>461</sup>

Here again, these numbers do not provide a complete picture. The federal district courts also imposed Rule 11 sanctions in thirty-eight of the forty-three appellate decisions collected for this Article.<sup>462</sup> Monetary sanctions in the form of attorneys’ fees were the sanction of choice by the federal district courts in twenty-eight out of those thirty-eight cases,<sup>463</sup> or

<sup>460</sup> See *supra* note 459.

<sup>461</sup> ON MOTION—SECOND CIRCUIT: *Williams*, 2000 WL 341259, at \*7 (complaining of wrongful discharge in retaliation for exercise of First Amendment rights; imposing sanctions on plaintiff’s counsel); THIRD CIRCUIT: *Lal*, 935 F. Supp. at 578 (seeking relief under 42 U.S.C. § 1983; imposing sanctions on plaintiff’s counsel); *Watson*, 934 F. Supp. at 665 (alleging Title VII race discrimination and seeking relief under 42 U.S.C. § 1983; imposing sanctions on plaintiff’s counsel); FIFTH CIRCUIT: *Prewitt*, 173 F.R.D. at 440-41 (alleging violation of 42 U.S.C. §§ 1973, et seq., 1981, 1981A, 1983, 1985, 2000e et seq., and 3601 et seq. for, among other things, wrongful discharge; imposing sanctions on pro se plaintiff); SIXTH CIRCUIT: *Kratage*, 926 F. Supp. at 106 (alleging violations of civil rights statutes and race discrimination in connection with denial of a site plan to develop property in a township; imposing sanctions on plaintiffs); SEVENTH CIRCUIT: *Cox*, 110 F. Supp. 2d at 791 (seeking relief from employment discrimination; imposing sanctions on plaintiff); *Cooper*, 1997 U.S. Dist. LEXIS 5299, at \*8, \*20 (complaining of wrongful termination based on intentional discrimination in violation of 42 U.S.C. § 1981; imposing sanctions on plaintiff’s counsel).

VIA ORDER TO SHOW CAUSE—FIFTH CIRCUIT: *Hicks*, 973 F. Supp. at 690-91 (alleging violation of 42 U.S.C. § 1983; imposing sanctions on pro se civil rights plaintiff).

<sup>462</sup> See *supra* notes 343-47 and accompanying text (noting the twelve orders to show cause that were granted); *supra* note 376 and accompanying text (stating that a total of twenty-six motions were granted).

<sup>463</sup> See SECOND CIRCUIT: *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52 (2d Cir. 2000) (\$45,000); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999) (\$25,000); *Sakon v. Andreo*, 119 F.3d 109 (2d Cir. 1997) (\$2,700); *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320 (2d Cir. 1995) (\$2,000); THIRD CIRCUIT: *Edwards v. Gen. Motors Corp.*, 153 F.3d 242 (5th Cir. 1998) (\$46,820); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996) (\$15,000); *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) (\$1,000); *Simmerman v. Corino*, 27 F.3d 58 (3d Cir. 1994) (\$7,000); FIFTH CIRCUIT: *Thornton v. Gen. Motors Corp.*, 136 F.3d 450 (5th Cir. 1998) (all fees reasonably incurred by defendant in defending suit); *Elliott v. Tilton*, 64 F.3d 213 (5th Cir. 1995) (\$7,850); SIXTH CIRCUIT: *Heldt v. Nicholson*, No. 00-1495, 2001 WL 111648 (6th Cir. Jan. 31, 2001) (\$6,429); *Powell v. Squire, Sanders & Dempsey*, Nos. 98-3668, 98-3670, 1999 WL 519186 (6th Cir. July 16, 1999) (\$1,000); *Cobleigh v. United States*, No. 97-2302, 1999 WL 195738 (6th Cir. Mar. 23, 1999) (\$360); *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998) (\$28,640.80); *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997) (\$32,546.02); SEVENTH CIRCUIT: *Divane v. Krull Elec., Inc.*, 200 F.3d 1020 (7th Cir. 1999)

in 74% of the cases in which sanctions were awarded. Adding these totals together yields the following results: (1) out of the one hundred thirty-five cases collected for this Article, Rule 11 sanctions were imposed by the federal district courts in sixty-six of those cases,<sup>464</sup> or 49% of the time; and (2) of those sixty-six cases imposing sanctions, monetary sanctions in the form of attorneys' fees were awarded as the Rule 11 sanction of choice by the federal district courts in fifty-three of the cases, or 80% of the time.<sup>465</sup>

## 5. Summary

The federal district courts seem to be much more consistent than the federal appellate courts when it comes to Rule 11 motion practice. More specifically, the district courts appear to be fairly uniform in rejecting warning letters as adequate notice, in requiring separate motions, and in insisting on full compliance with the twenty-one day safe harbor period prior to filing a Rule 11 motion in court.<sup>466</sup> But it is also fair to say that Rule 11 practice as a whole in the district courts is more troubling. First, the district courts, for the most part, do not address *when* a Rule 11 motion or an order to show cause *should* be filed or issued, and this issue can have a dramatic impact on the effectiveness of the 1993 amendments.<sup>467</sup> Second, the district courts seem to have difficulty complying with due process either because they do not issue an order to show cause or because the order that is issued fails to satisfy the minimum requirements set out by the appellate courts.<sup>468</sup> Third, there is a much stronger suggestion that orders to show cause are being used to sidestep the Rule 11 motion requirements or that such use is being contemplated.<sup>469</sup> Finally, it seems clear that the Rule 11 sanction of

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(\$33,292); *Harter v. Iowa Grain Co.*, Nos. 96-3907, 97-2671, 97-2041, 1999 WL 754333 (7th Cir. July 15, 1998) (\$92,000); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041 (7th Cir. 1998) (\$200); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147 (7th Cir. 1996) (\$800); NINTH CIRCUIT: *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001) (\$75,000); *Hutchinson v. Hensley Flying Serv., Inc.*, No. 98-35361, 2000 WL 11432 (9th Cir. Jan. 6, 2000) (amount not specified); *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998) (\$2,500); see also *supra* note 448 for the remaining six cases that awarded monetary sanctions via orders to show cause.

<sup>464</sup> See *supra* notes 430, 455, 462.

<sup>465</sup> See *supra* notes 457, 463.

<sup>466</sup> See *supra* Part III.B.1.

<sup>467</sup> See *supra* Part III.B.3.

<sup>468</sup> See *supra* text accompanying notes 424-29.

<sup>469</sup> See *supra* Part III.B.4.a.

choice in the district courts, regardless of whether the sanction is imposed pursuant to motion or by order to show cause, remains attorneys' fees.<sup>470</sup>

#### IV. THE CHILLING EFFECTS CONTINUE

##### A. *The Impact on Civil Rights Cases*

So, are the amendments working? Have they been successful in reducing Rule 11's chilling effects? Some commentators have observed anecdotally that Rule 11 use seems to have declined following the 1993 amendments.<sup>471</sup> This observation appears to have some empirical support. For example, Professor Vairo reports that, by the time Rule 11 was amended in 1993, there were 600 published federal appellate court decisions dealing with the 1983 version of the Rule.<sup>472</sup> In contrast, my research indicates that, by December 18, 2001—eight years after the 1993 amendments went into effect—there was a total of 442 federal appellate court decisions, a decrease of approximately 26%. Of the total number of appellate cases, however, *only* 233 represent published opinions, the

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<sup>470</sup> See *supra* Part III.B.4.b-c.

<sup>471</sup> See, e.g., Laura Duncan, *Sanctions Litigation Declining: Decrease Attributed to 1-Year-Old Safe Harbor Amendments to Rule 11*, 81 A.B.A. J. 12 (1995) (concluding that "initial results show a marked decline in reported cases under the new Rule 11, a trend confirmed by interviews with federal judges, lawyers and law professors"); Hirt, *supra* note 106, at 1026 ("To date, there is relatively little academic or practitioner commentary on how the amended Rule operates. There is, however, some 'anecdotal' reporting, with some commentators stating that there are fewer sanctions motions filed under the amended Rule."). Hirt goes on to comment that,

Despite the passage of over five years since the amended Rule went into effect, there has been relatively little commentary on it in reported cases. Although some courts have commented on the impact of the 1993 amendments in the course of their rulings, their commentary has been brief; only a small number of decisions express opinions as to the reforms intended by the amended Rule.

Hirt, *supra* note 106, at 1029 (footnotes omitted); Georgene M. Vairo, *Rule 11 Update*, SC01 ALI-ABA 277, 279 (1997) ("[T]he volume of Rule 11 activity is greatly diminished. Some judges report that nobody is making Rule 11 motions any more . . . . My experience confirms these anecdotal reports. When the rule was in its heyday, I would rip handfuls of Rule 11 cases out of each advance sheet reporter."); see also Spiegel, *supra* note 72, at 159 n.19 (noting that "[t]he commentary on the 1983 version of Rule 11 was voluminous" and finding over 100 articles on the 1983 version, compared to only 20 on the 1993 version).

<sup>472</sup> See Georgene M. Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998) [hereinafter Vairo, *Profession*]. Professor Vairo's article refers to "reported" decisions. Via an email exchange between Professor Vairo and me, I was able to confirm with her that her statistics only included published opinions.

remaining 209 are unpublished.<sup>473</sup> The decrease in *published* appellate decisions, therefore, is approximately 61%. As one would probably expect, given the appellate court numbers, some preliminary evidence suggests that the decline in Rule 11 use is present in the federal district courts as well.<sup>474</sup> This reduction in Rule 11 activity could certainly support an argument that the 1993 amendments have been at least partially successful in reducing the Rule's chilling effects in the federal courts. Based on the research conducted for this Article, however, I do not believe that this reduction in Rule 11 use, by itself, warrants this conclusion.

By way of very brief review, recall that Rule 11's chilling effects take two different, but related forms: first, Rule 11 chilled creative advocacy by stifling the development of the common law and inhibiting vigorous advocacy; second, Rule 11 was used disproportionately against certain kinds of litigants and their attorneys, namely, those asserting civil rights claims.<sup>475</sup> Recall also that the primary causes of the Rule's chilling effects were previously identified as including: the amount of discretion committed to federal district court judges, the inconsistent application of the Rule, the lack of uniform sanctioning procedures, insufficiently rigorous appellate review, the use of Rule 11 as a fee-shifting device,

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<sup>473</sup> I conducted the following two Westlaw searches in Westlaw's CTA database: (1) on August 31, 2000, I ran the following query: "Federal Rule of Civil Procedure 11" "Rule 11" "Fed R Civ P 11" /p sanction! & Da(aft 11/30/1993); and (2) on December 18, 2001, I ran the following query: "Federal Rule of Civil Procedure 11" "Fed R Civ P 11" "FRCP 11" "Rule 11" /p sanction! & Da(aft 8/31/2000). The first of the two searches produced 834 cites; the second of the two searches produced 108 cites. I then had my research assistants, MaryAnne Carlson and Eric Lenz, go through each of the cases: (a) to determine whether the case was in fact a case discussing Rule 11 of the Federal Rules of Civil Procedure; and (b) to make sure that the cases we counted did indeed discuss the 1993 Rule. From this we gathered the totals cited in the text. I am extremely grateful to Ms. Carlson and Mr. Lenz for their assistance in this endeavor.

<sup>474</sup> Two districts were selected in the Ninth Circuit, namely the Northern and Central Districts of California, in which to test the hypothesis that Rule 11 use has declined in the federal courts since the 1993 amendments. My research assistant, Kristin M. Schuh, ran searches on LEXIS in each district for the following five-year time periods: January 1, 1986, through December 31, 1991, for the 1983 version of the Rule, and January 1, 1996, through December 31, 2001, for the 1993 version. This limited sample reveals the following: Rule 11 was raised in 75 cases under the 1983 version of the Rule (23 cases in the Central District, 52 cases in the Northern District) and in a total of 54 cases under the 1993 Rule (17 cases in the Central District, 37 cases in the Northern District), for a decrease in Rule 11 use of approximately 28%. See *infra* Appendix 4.

<sup>475</sup> See *supra* notes 28-49 and accompanying text.

and, finally, the substantive bias in the federal courts against certain kinds of litigants bringing certain types of claims.<sup>476</sup> The only way that the 1993 amendments to Rule 11 could reduce the Rule's chilling effects was if those amendments addressed the causes and, more particularly, if they *successfully* addressed those causes. Ultimately, whether the amendments *successfully* addressed those causes turned, in large part, on how the federal courts chose (and continue to choose) to interpret and apply the 1993 amendments to the Rule.

One hundred and thirty-five cases were collected for this Article. But even this number constitutes a small sample relative to *all* of the Rule 11 activity conducted in the six federal circuits studied.<sup>477</sup> Any conclusions reached here, therefore, are anecdotal.<sup>478</sup> Notwithstanding these limitations (or criticisms), however, enough data was collected and analyzed to at least draw some preliminary conclusions with respect to Rule 11 practice in the federal courts.<sup>479</sup> Based on the research conducted

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<sup>476</sup> See *supra* notes 54-72 and accompanying text.

<sup>477</sup> See, e.g., Spiegel, *supra* note 72, at 169 ("The majority of Rule 11 cases are not reported in published opinions, even if we include within our definition of published opinions decisions available on Lexis or Westlaw."). In 1989, Professor Burbank remarked that, even viewed in gross, published opinions are not a reliable index of what is happening in district courts, at least in the Third Circuit. Only 9.1% of the decisions on Rule 11 issues in the period June 30, 1987 through July 1, 1988 . . . have been or are scheduled to be, published in Federal Supplement or Federal Rules Decisions. Only 39.1% of those decisions are available on Lexis.

Burbank, *Transformation*, *supra* note 61, at 1955-56. Theodore Hirt has also stated that, Although the above discussion reflects how the amended Rule is being applied in published rulings, only limited conclusions can be drawn from it. First, reported cases do not reflect court rulings that, for whatever reason, do not appear in published services. Second, reported cases do not reveal the behavior of other litigants that may be affected by the amended Rule.

Hirt, *supra* note 106, at 1042-43.

<sup>478</sup> In 1989, Professor Burbank commented that the debate surrounding the 1981 proposal to amend Rule 11 was "too often . . . a debate characterized by 'cosmic anecdote[s],' on the one hand and confident assertions on the other, both largely uninformed by data, except perhaps the selective reading of published opinions." Burbank, *Transformation*, *supra* note 61, at 1955-56.

<sup>479</sup> For example, Professor Tobias has stated that

It is too soon to discern all of the implications of judicial enforcement for civil rights litigants and attorneys, while caution should be exercised in relying primarily on reported decisions. Nevertheless, the reported opinions issued thus far, considerable unreported activity, and some anecdotal evidence related to rule 11 reveal certain ways in

here, an argument can be (and is being) made that the 1993 amendments have not been successful in reducing Rule 11's chilling effects primarily because many of the causes of the chilling effects continue to exist in practice.

Let's start with the district courts' discretion. Even under the 1993 amendments, a federal district judge still has an enormous amount of discretion.<sup>480</sup> Based on the research collected, the best examples, not only with respect to the amount of discretion committed to the district courts, but also with respect to its uses, are orders to show cause and the choice of sanctions. Clearly, decisions as to *whether* to issue an order to show cause and for what purpose, and *whether* to impose Rule 11 sanctions pursuant to that order are left entirely to the discretion of the district courts. Again, there is some indication that the district courts are issuing orders to show cause specifically to circumvent the Rule 11 motion requirements.<sup>481</sup>

In addition, while the percentage of orders to show cause issued was (and is) relatively low compared to the number of Rule 11 motions filed, the percentage of orders to show cause that were (and are) actually granted is substantially higher than the success rate of motions.<sup>482</sup> One explanation for the higher sanctioning rate under orders to show cause is that, "[i]n even a close case, . . . it [is] extremely unlikely that a judge, who has already decided that the law is not as a lawyer argued it, will also decide that the loser's position was warranted by existing law."<sup>483</sup> But even this explanation only serves to highlight the amount of discretion the district courts continue to have because it is ultimately the district court judge who decides whether the argument being made has "evidentiary support"<sup>484</sup> and/or is "warranted by existing law or by a

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which its application has adversely affected civil rights litigants and their lawyers.

Tobias, *Litigation*, *supra* note 23, at 489.

<sup>480</sup> See *supra* text accompanying notes 127-28.

<sup>481</sup> See *supra* Part III.B.4.a.

<sup>482</sup> See *supra* text accompanying notes 433-34.

<sup>483</sup> Simpson, *supra* note 22, at 505 (citation and footnote omitted).

<sup>484</sup> FED. R. CIV. P. 11(b)(3).



nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>485</sup>

The district courts are also very clear that they have great discretion in deciding *what* constitutes an "appropriate" Rule 11 sanction,<sup>486</sup> and they have made it abundantly clear that the "appropriate" sanction in the vast majority of cases in which sanctions were awarded is monetary sanctions in the form of attorneys' fees.<sup>487</sup> It seems fairly obvious, therefore, that Rule 11 is still being used as a fee-shifting device in the federal courts, especially given the size of some of the sanctions awards<sup>488</sup> and the fact that the district courts seem to award *all* of a litigant's "reasonable" attorneys' fees incurred in defending an action in a significant percentage of the cases.<sup>489</sup>

While there appears to be more uniformity in sanctioning procedures, particularly at the district court level (at least with respect to Rule 11 motion practice),<sup>490</sup> there is also evidence from the research that Rule 11 continues to be interpreted and applied inconsistently between and within federal circuits, with the inconsistent application being most

<sup>485</sup> FED. R. CIV. P. 11(b)(2); *see also*, *Chauvet v. Local 1199 Drug, Hosp. & Health Care Employee Union*, Nos. 96 Civ. 2934(65), 96 Civ. 4622(55), 1996 WL 665610, at \*16 (S.D.N.Y. Nov. 18, 1996) ("In deciding *whether* to impose sanctions, '[d]istrict courts generally have wide discretion.'" (emphasis added) (citation omitted)).

<sup>486</sup> *See, e.g.*, *Kramer v. Tribe*, 156 F.R.D. 96, 100 (D.N.J. 1994) (reiterating that the district courts have broad discretion in fashioning an "appropriate" Rule 11 sanction).

<sup>487</sup> *See supra* Part III.A.3, B.4.c. In *Howard v. Klynveld Peat Marwick Coedeler*, for example, the court found that it

has the discretion to fashion an appropriate sanction for a Rule 11 violation. The critical consideration in exercising this discretion is that the policy underlying Rule 11 is to "sanction" rather than to "reimburse[]." . . . However, the typical sanction imposed is the payment of the other party's reasonable attorney's fees which were incurred as a result of the violation.

977 F. Supp. 654, 667 (S.D.N.Y. 1997). Similarly, in *Religious Technology Center v. Gerbode*, the court stated that

Rule 11(c)(1)(A) now makes it discretionary with the court as to whether or not to award attorneys' fees to the prevailing party "incurred in presenting or opposing the motion." The rule does not require the presence of any exceptional circumstances for the award of such fees, but only that the award be "warranted."

No. 93-2226AWT, 1994 WL 228607, at \*4 (C.D. Cal. May 2, 1994) (footnote omitted).

<sup>488</sup> *See supra* text accompanying notes 383-84, 458.

<sup>489</sup> *See supra* text accompanying note 459.

<sup>490</sup> *See supra* Part III.B.1.

pronounced at the federal appellate court level.<sup>491</sup> Nor does it look likely that these inter and intracircuit conflicts will be resolved any time soon, given that the federal appellate courts are not issuing en banc opinions, they are not publishing a significant percentage of their opinions, and the United States Supreme Court has yet to be heard on amended Rule 11.<sup>492</sup>

Is appellate review more rigorous now after the 1993 amendments? This is a difficult question to answer, based on the research conducted. Obviously, abuse of discretion remains the applicable standard of review for all Rule 11 decisions.<sup>493</sup> The cases indicate, however, that the abuse of discretion standard is not clearly defined or consistently applied by the federal appellate courts. In fact, some of the appellate courts continue to employ multiple tiers of review under the rubric of "abuse of discretion."<sup>494</sup> The evidence is also unclear as to whether the findings requirement is being strictly enforced.<sup>495</sup> Absent detailed findings by the district courts, the effectiveness of appellate review will be severely impacted.<sup>496</sup> Based on these two limited indicia, therefore, it does not appear that appellate review of district court sanctioning decisions is any more rigorous now than it was prior to the 1993 amendments.

Probably the most controversial cause contributing to Rule 11's chilling effects is the claim that there is a substantive bias in the federal courts against plaintiffs bringing civil rights claims in the federal courts. This claim was based in part on empirical evidence that plaintiffs were the target of sanctions much more frequently than defendants and that plaintiffs in civil rights cases were targeted at a rate disproportionate to litigants in other cases.<sup>497</sup> The research conducted here is consistent with these findings.<sup>498</sup> Specifically, the research here supports all of the following: (1) plaintiffs were targeted much more frequently for Rule 11

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<sup>491</sup> See *supra* Part III.A.1-2.

<sup>492</sup> See *supra* Part III.A.4.c.

<sup>493</sup> See *supra* text accompanying notes 125-26.

<sup>494</sup> See *supra* Part III.A.4.a.

<sup>495</sup> See *supra* Part III.A.4.b.

<sup>496</sup> See *supra* text accompanying notes 125-26.

<sup>497</sup> See *supra* notes 31-44 and accompanying text.

<sup>498</sup> I want to emphasize again that the size of the case law sample collected for this article is not large enough to generate statistically significant results. I include the numbers, however, because they are consistent with earlier findings and, therefore, suggest that certain trends continue to exist in the federal courts.

sanctions than defendants, 77% versus 23% of the time, respectively;<sup>499</sup> (2) with the exception of plaintiffs in personal injury cases (88%), plaintiffs in civil rights cases (85%) were targeted at a much higher rate, relative to plaintiffs in contracts (61%) or other commercial cases (72%);<sup>500</sup> and, perhaps most significantly, (3) plaintiffs in civil rights cases were actually sanctioned more frequently (71%) than plaintiffs in any of the other categories of cases, namely, personal injury (27%), contract (43%), or other commercial cases (46%).<sup>501</sup>

The Second Circuit also appears to believe that a substantive bias exists. In *Hadges v. Yonkers Racing Corp.*,<sup>502</sup> the Second Circuit reversed Rule 11 sanctions imposed on a civil rights plaintiff and his attorney, Kunstler.<sup>503</sup> In reversing the sanctions imposed on Kunstler, the Second Circuit stated that “the remarks by the district court<sup>[504]</sup> . . . contribute to our conclusion that the sanction against Kunstler was unjustified. These remarks have the appearance of a personal attack against Kunstler, and

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<sup>499</sup> See *infra* Appendix 5.

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> 48 F.3d 1320 (2d Cir. 1995).

<sup>503</sup> *Id.* at 1329, 1331.

<sup>504</sup> These remarks included the following:

Mr. Kunstler is apparently one of those attorneys who believes that his sole obligation is to his client and that he has no obligations to the court or to the processes of justice. Unfortunately, he is not alone in this approach to the practice of law, which may be one reason why the legal profession is held in such low esteem by the public at this time.

*Id.* at 1324.

Finally, Mr. Kunstler claims that he is entitled to “consideration” because of his representation of unpopular clients. Undoubtedly an attorney who assumes or is assigned the defense of an unpopular case or client and does so at risk to his practice or standing in the community (such as the fictional attorney Atticus Finch in Harper Lee’s “To Kill a Mockingbird”) is entitled to some consideration. However, an attorney who aggressively and repeatedly seeks to represent unpopular causes or questionable clients for personal reasons of his own is not deserving of any particular consideration. And an attorney who places himself and his causes above the interests of justice is entitled to none.

*Id.* at 1325. Also, in denying Kunstler’s application to reargue the sanctions, the district court “quoted at length from a recent New York state court opinion criticizing Kunstler’s law partner . . . in an entirely unrelated case.” *Id.*

*perhaps more broadly, against activist attorneys who represent unpopular clients or causes.”*<sup>505</sup>

A substantive bias is also suggested by the heightened pleading standards that continue to be imposed in civil rights cases.<sup>506</sup> Two “tirades” by a federal district judge sitting in the Fifth Circuit, specifically, the Western District of Texas, against a pro se civil rights plaintiff are particularly troubling. In one, the judge made the bald statement that filing a “frivolous” civil suit against a judge—and apparently the plaintiff’s lawsuit fell into this category—“warrants the imposition of sanctions under Rule 11.”<sup>507</sup> In the other, the court discussed at great length the impact that frivolous civil rights cases in particular had on his docket.<sup>508</sup>

Since one of the reasons that Rule 11 was (and arguably still is) wielded so disproportionately against plaintiffs filing civil rights claims is because of a substantive bias against these types of claims and litigants in the federal courts, the only sure way that the 1993 amendments to Rule 11 could successfully address this issue is if it changed that bias. Unfortunately, a rule of procedure, or any law for that matter, does not and cannot accomplish this task.<sup>509</sup>

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<sup>505</sup> *Id.* at 1331 (emphasis and footnote added).

<sup>506</sup> *See, e.g., Hicks v. Bexar County, Texas*, 973 F. Supp. 653, 673 (W.D. Tex. 1997).

<sup>507</sup> *Id.* at 688. The district judge stated,

The filing of frivolous civil lawsuits against judicial officers deserves a special place in the cornucopia of evils plaguing our judicial system because such lawsuits are not only an affront to the dignity of the courts but also an assault upon the integrity of our judicial system. The filing of such lawsuits warrants the imposition of sanctions under Rule 11.

*Id.*

<sup>508</sup> *Id.* at 689. More specifically, the district judge stated,

[T]he filing of this frivolous civil rights lawsuit by plaintiff has not been without its impact on the docket of this Court. The filing of this lawsuit, and the flow of many similar, equally frivolous, federal civil rights lawsuits flooding into this Court in recent months has placed a great strain on this Court’s ability to timely address the many potentially meritorious federal habeas corpus actions pending in this Court.

*Id.*

<sup>509</sup> Armour, *Practice*, *supra* note 55, at 776-77.

The [1993] amendments cannot fully lay to rest the two major concerns of critics challenging the discretionary nature of the courts’ sanctions

Thus, because it seems likely that the causes of Rule 11's chilling effects still exist, it is also very likely, if not probable, that Rule 11's chilling effects continue to exist in practice as well. The result, of course, is that Rule 11 can potentially chill *all* litigants who file claims in federal court. But the more particular and unfortunate result, and one that cannot be overlooked, is that *certain kinds of litigants asserting certain kinds of claims* are more likely to bear the brunt of the Rule's chilling effects.

We know, for example, that plaintiffs, and more particularly *plaintiffs bringing civil rights lawsuits*, are sanctioned much more frequently in the federal courts than defendants and other plaintiffs bringing other types of claims.<sup>510</sup> We also have some idea as to why.<sup>511</sup> We also know that

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practice. The first is the potential for bias disguised as the personal, experiential basis of the courts' subjective, intuitive judgments . . . . The second is the problem of defining acceptable variability in the application the Rule in a way that guides or limits the courts' decisionmaking. These are inevitable by-products of discretionary decisionmaking . . . .

*Id.* (footnote omitted). In writing about the then proposed amendments to the 1983 version of Rule 11, Professor Tobias wrote, "The proposal . . . attempts to correct or ameliorate numerous difficulties the highly controversial 1983 revision has posed. These complications have been attributed more to judicial application than to the wording of the Rule, and this is a conundrum which few amendments, no matter how carefully drafted, can fully address." Tobias, *Plaintiffs*, *supra* note 31, at 1788 (footnote omitted). Then, commenting on the amended Rule 11, Professor Tobias wrote that

It is important to evaluate and to make recommendations for implementing the new Rule because many difficulties that the 1983 version posed were attributable more to judicial enforcement and to lawyers' and litigants' invocation of the provision than to its actual phrasing. Nevertheless, few rule revisions, particularly revisions which attempt to remedy problems as complex as those that the revisers sought to rectify when they amended Rule 11 in 1983, and as vexing as the complications presented by that version's effectuation, can perfectly address all of these difficulties. These assertions are true even when the Rule revisers crafted amendments as carefully as the drafters of the 1993 revision of the Rule did.

Tobias, *Revision*, *supra* note 20, at 188 (footnote omitted).

<sup>510</sup> The statistics and studies show that plaintiffs will be the target of Rule 11 sanctions more frequently than defendants, plaintiffs will be sanctioned at a much higher rate than defendants, and Rule 11 sanctions will actually be imposed against plaintiffs and their attorneys in civil rights cases at a rate significantly higher than other litigants in other cases. See *supra* notes 31-44 and accompanying text.

<sup>511</sup> Plaintiffs initiate lawsuits, so a higher sanctioning rate here is to be somewhat expected. See *supra* text accompanying note 71. As to why civil rights cases are sanctioned at a disproportionately higher rate, two reasons are suggested. First, as previously discussed, there appears to be a substantive bias in the federal courts against these types of

prior exposure to some kind of Rule 11 activity actually causes attorneys to change the way they counsel their clients<sup>512</sup> and that court decisions that impose Rule 11 sanctions have more impact on a legal community than decisions not to sanction.<sup>513</sup> Thus, because plaintiffs bringing civil

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claims. See *supra* notes 70-72, 497-508 and accompanying text. Second, civil rights cases are often not based on well-settled principles of law and instead involve new or novel theories of law, which may not be recognized as valid or meritorious by the federal courts. See, e.g., Wiggins, *supra* note 37, at 24 ("We found in all five districts . . . that by far the most common reason given for imposing sanctions in civil rights cases was an inadequate legal inquiry."); Tobias, *Litigation*, *supra* note 23, at 496-97. According to Professor Tobias,

The inherent characteristics of civil rights cases and the constraints on civil rights plaintiffs and lawyers, over most of which they have little control, can make them seem to contravene the amendment. This is true of rule 11's requirements regarding the law. Certain characteristics intrinsic to many civil rights actions can leave impressions that the legal inquiries which preceded their filing were insufficient. Instructive illustrations are afforded by the substantial number of civil rights suits that attempt to assert new or comparatively untested theories of law. These concepts are at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate, that discovery can be essential to drafting a very specific complaint or to articulating a precise theory of the case, and that the concepts, once formulated, look nontraditional and even implausible—all of which can contribute to appearances of inadequacy.

Tobias, *Litigation*, *supra* note 23, at 496-97.

<sup>512</sup> According to the AJS study, "lawyers who had previously been exposed to some degree of Rule 11 activity—ranging from having been involved in a case in which sanctions were imposed to cases involving out-of-court threats—were more likely to report having changed their behavior in counselling clients." Marshall, *supra* note 10, at 980.

<sup>513</sup> Professor Armour writes,

In a Rule 11 context, consider two similar cases decided by different judges with different outcomes; one results in sanctions, the other doesn't, and both are affirmed on appeal under the abuse of discretion standard. Neither case should be treated as anything other than affirming the court's discretion to act as they did, and a third judge facing the problem is free to decide either way. *However, the deterrent impact of the sanction case poses a serious threat, since in the sanction case law, it will be the adverse sanctions cases that begin to define the boundaries of Rule 11 and guide a litigant's behavior. Thus, the two cases are not treated equally in the real world of practice . . .*

Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 566 (1997) [hereinafter Armour, *Rethinking*] (emphasis added).

The AJS study appears to be in agreement. According to that study,

One of the most significant questions that needs to be asked about Rule 11 . . . is how it has affected lawyers' practice. *For the impact of a sanctions order or threat can extend far beyond the case in which it is carried out or the lawyers who are directly affected by it. Lawyers who hear and read*

rights claims in the federal courts are targeted *and* sanctioned under Rule 11 more frequently than other litigants bringing other kinds of claims, *this* category of litigant and claim is much more likely to be chilled by Rule 11.<sup>514</sup>

As a result of Rule 11, therefore, a significant percentage of civil rights attorneys counsel their clients not to file claims that the attorneys think have merit, do not file papers that they would like to file in a given case, and even discourage their clients, or potential clients, from filing lawsuits.<sup>515</sup> All of this, of course, results in stifling the development of

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*about these sanctions must, to some extent, process the information and shape their own conduct based on their assessment of the risk that various kinds of conduct they are contemplating creates.*

Marshall, *supra* note 10, at 960 (emphasis added).

<sup>514</sup> As Professor Yamamoto notes,

Rule 11 sanctions escalate the professional and financial risk of litigating cases that are important to bring but difficult to win. Contingent fee, reduced fee, and pro bono lawyers and public interest firms are most likely to represent minorities raising difficult issues. In so doing, they accept a financial risk. If their clients lose, and they often will, the attorneys receive little or no compensation. For a small firm or a public interest law organization, that risk can be significant. If losing, however, means not only uncompensated time but also out-of-pocket payment of defendants' attorney's fees, the risk expands exponentially.

Yamamoto, *Efficiency's Threat*, *supra* note 72, at 370 (footnote omitted). Professor Tobias also takes the position that

it is important to remember that the resource constraints of civil rights lawyers make them peculiarly susceptible to the rule's potential chilling effects; the prospects of spending large sums to complete prefilings inquiries that will be deemed sufficient, to appeal adverse rule 11 decisions, or to litigate nice questions of the amendment's interpretation, can be nearly as discouraging as the threat that sanctions will be imposed.

Tobias, *Litigation*, *supra* note 23, at 509.

<sup>515</sup> More specifically, the authors of the AJS study found that

civil rights defense lawyers appear to be disproportionately unaffected by Rule 11 . . . . [R]espondents who identified themselves as spending more than 50% of their time doing civil rights plaintiffs' work were far more likely to be affected by Rule 11 than other lawyers in virtually every response category that was measured. For example, 44% of the self-identified civil rights plaintiffs' lawyers reported that they had advised a client not to pursue a lawsuit that had little or no merit, compared to 13.2% of those who spend most of their time on civil rights defense work. That this disparity is not attributable purely to the plaintiff orientation of this specific question can be seen by looking at the response rates to the question of whether the lawyer decided not

the common law and discouraging court access for marginal litigants asserting claims that challenge the existing status quo.<sup>516</sup> Consequently, even if Rule 11 were being wielded disproportionately against plaintiffs bringing civil rights cases simply because more civil rights cases tend to be “losers,”<sup>517</sup> rather than because of a substantive bias in the federal courts,<sup>518</sup> the result would remain the same—Rule 11 would still produce its chilling effects and would still disproportionately chill plaintiffs bringing civil rights claims.

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to assert a claim or defense that the lawyer felt had potential merit. This question is not particularly plaintiff-oriented, yet 31% of civil rights plaintiffs’ lawyers reported having taken this action, compared to 17.9% of those who do civil rights work on the defense side[, and compared to 19.3% of all the respondents surveyed for this study]. Similarly, 24% of civil rights plaintiffs’ lawyers reported that they had not filed particular papers in a given case that they would have liked to file, compared to 10% of those doing civil rights defense work[, and compared to 12.2% of all the respondents surveyed].

Marshall, *supra* note 10, at 971 (footnotes omitted).

<sup>516</sup> Professor Cutler writes that,

because plaintiffs commence litigation while defendants merely respond to allegations, and since plaintiffs are required to produce evidence at trial while defendants typically are not, judges may examine plaintiffs’ conduct more carefully and punish plaintiffs more severely to eliminate frivolous claims early in the judicial process and deter similar future claims. This stricter standard for plaintiffs, intended to minimize frivolous claims, could chill efforts of litigants with limited resources who cannot afford to pay a Rule 11 sanction and also dissuade litigants from filing novel or marginal claims. This could ultimately hamper the development of the law, especially in unsettled areas.

Cutler, *supra* note 22, at 282-83 (footnotes omitted). According to Professor Yamamoto, [R]ecent federal procedural reforms [including Rule 11] have subtly yet measurably discouraged judicial access for those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms. The reforms assume and facilitate a procedural system hospitable to litigants with disputes involving well-settled legal principles. Efficiency reforms [again including Rule 11] make expendable those raising difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system’s and society’s margins.

Yamamoto, *Efficiency’s Threat*, *supra* note 72, at 345. See also *infra* Part IV.C.

<sup>517</sup> This is the position taken by Professor Yablon. See generally Yablon, *supra* note 45.

<sup>518</sup> Professors Yablon and Spiegel acknowledge that Rule 11 has a disproportionate impact on plaintiffs bringing civil rights claims and that this impact is problematic. Both professors question, however, whether the disproportionate impact is the result of a substantive bias in the federal courts against civil rights claims. See generally Spiegel, *supra* note 72; Yablon, *supra* note 45.



Unfortunately, another problem under the 1993 version of the Rule is that we will probably no longer have the same amount of statistics to prove that Rule 11's chilling effects continue to exist in practice either because: (1) a civil rights plaintiff will either decide, or be counseled by an attorney, in the first instance not to file a given claim(s) or lawsuit in federal court, even one with merit, for fear of potentially devastating Rule 11 sanctions;<sup>519</sup> or (2) the civil rights plaintiff who is served with a Rule 11 motion will take advantage of the safe harbor provision and withdraw the claim, regardless of its potential merit, to avoid sanctions.<sup>520</sup> In either case, and assuming in the latter instance that the Rule 11 motion is not filed with the district court after withdrawal, no sanctions activity would be recorded and, hence, available to be counted.

If the foregoing prediction is correct, then *any interested observer should expect to find less reported Rule 11 activity in the federal courts.* Indeed, as previously noted, there is already some suggestion that Rule 11 use at both the federal appellate and district court levels has in fact declined following the 1993 amendments.<sup>521</sup> Rather than supporting the theory that the amendments have been successful in reducing Rule 11's chilling effects, therefore, I believe, for all of the reasons discussed above, that the reduction in reported Rule 11 activity is actually consistent with a finding that Rule 11's chilling effects continue to exist in practice.

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<sup>519</sup> Indeed, a district court warned civil rights plaintiffs' attorneys that they face personal financial consequences for a Rule 11 violation. See *Watson v. City of Salem*, 934 F. Supp. 643, 665 (D.N.J. 1995) (writing in a civil rights case, the district court stated that "[t]he 'effective deterrence' standard of Rule 11(c)(2) is met in this case because attorneys who fail to withdraw baseless claims should know they may risk personal financial consequences for the harm they cause to innocent litigants") (emphasis added); cf. Tobias, *Recalibrated*, *supra* note 28, at 109 n.2 ("One court and a few commentators asserted that it was impossible to determine how many valid lawsuits were abandoned out of concern about expensive satellite litigation or substantial assessments.") (citations omitted).

<sup>520</sup> Indeed, this ability to withdraw a claim is one of the very purposes for which the safe harbor provision was added. See FED. R. CIV. P. 11 advisory committee's note.

These provisions [i.e., the safe harbor provision] are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

*Id.*

<sup>521</sup> See *supra* notes 471-73 and accompanying text.

*B. Solutions*

## 1. Repeal or Amendment?

The 1983 version of Rule 11 was amended specifically because of the problems it engendered.<sup>522</sup> Based on the research conducted here, however, it does not appear that the 1993 amendments were successful in rectifying what was probably the most troubling problem created by the former Rule, namely, its chilling effects. Therefore, I believe that, at a minimum, the debate over whether Rule 11 should be repealed or amended once again to include a subjective bad-faith standard should be re-opened, not only because of the conclusion reached here with respect to the Rule's chilling effects, but for several other reasons as well.

First, Rule 11's primary purpose is to deter "frivolous" litigation. Indeed, teeth were originally added to the Rule in 1983 in an effort to curb the "explosion" of "frivolous" cases being filed in the federal courts.<sup>523</sup> This last statement rests on two assumptions, namely, that there was in fact a "litigation explosion" in the federal courts and that a significant portion of the cases being filed were "frivolous." Both assumptions are questionable at best. In fact, the FJC study, which surveyed federal district court judges, and other commentators strongly suggest that the problem of frivolous lawsuits in the federal courts may very well be illusory.<sup>524</sup> Commentators have also concluded that a majority of lawyers do not file "frivolous" claims.<sup>525</sup>

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<sup>522</sup> See *supra* notes 28-52 and accompanying text.

<sup>523</sup> See *supra* notes 23-25 and accompanying text.

<sup>524</sup> See, e.g., Armour, *Rethinking*, *supra* note 513, at 501-02.

Overall, the amended rule [11] was greeted with enthusiasm as one of the court reforms most likely to increase judicial efficiency by deterring the filing and pursuit of frivolous litigation. This justification for Rule 11, however, is routinely cited without any empirical basis in the supporting commentary to the rule. Recited with almost mantra-like regularity at the beginning of most Rule 11 articles, the "litigation explosion" has become an article of faith—an unquestioned assumption underlying Rule 11. Yet, there is a growing consensus among commentators that the assumption is unfounded.

*Id.* (footnotes omitted).

There is no data linking the alleged litigation explosion with an increased filing of frivolous litigation—that is the ultimate 'cosmic anecdote' and the driving force behind Rule 11. In light of the plethora of empirical evidence of Rule 11 undertaken to date, it is ironic that the

impetus for procedural reform resulting in the amendment of Rule 11 had no empirical justification. Reformers relied instead on the anecdotal experience of judges with individual cases and dockets to support the conclusion that frivolous litigation was adversely impacting the courts. There is no data indicating that docket congestion and litigation delays are due in any significant way to frivolous litigation or the 'lack of a reasonable pre-filing inquiry.' Nor is there any empirical baseline data reflecting statistical profiles of federal dockets which show that cases intercepted prior to trial, through summary judgment or motions to dismiss, raise legal or factual issues that could have been resolved prior to filing by more 'investigation.' It is worth noting that empiricism is raised defensively at the amendment stage to refute the critiques of Rule 11, yet it was never raised at the outset of the highly politicized process of judicial reform culminating in the 1983 amendments to the rules to document the court's need for the reform.

*Id.* at 502 n.40 (citations omitted). See also Vairo, *Where We Are*, *supra* note 27, at 480 (stating that "approximately three-quarters of the responding judges thought groundless litigation was either only a small problem or no problem at all") (footnote omitted); Wiggins, *supra* note 37, at 4 ("Our survey of district judges revealed that most judges ... find that groundless litigation presents only a small problem on their dockets[.]").

<sup>525</sup> See, e.g., Yablon, *supra* note 45, at 67, 81. Professor Yablon argues that many civil rights plaintiffs' attorneys may decide to file long-shots, that is, claims that have "a low (but not zero) probability of success." *Id.* at 67. Such claims, he argues, are not frivolous because "[frivolous claims], [u]nder the standard view ... are baseless claims that no reasonable lawyer would ever have brought." *Id.* at 81. By definition, therefore, because a long-shot has some, albeit a minimal, probability of success, such claims are not frivolous. *Id.* In comparison, Professor Armour discusses the "close case" and argues that Rule 11 sanctions should not be imposed in such cases. Armour, *Rethinking*, *supra* note 513, at 551-53. She explains the process by which an attorney decides whether to file a "close case." *Id.* She writes,

As a practicing attorney, the question of whether to pursue a close case, or any case in which there are compelling reasons to bring the litigation and yet experience tells you that you might not be successful in the trial court, poses a number of difficult judgments. Attorneys and judges, '[w]hen faced with data and the need to make judgments derived from that data, [like] all humans may be characterized as intuitive scientists.' Information is processed through beliefs, theories, propositions, and schemas. These knowledge structures enable us to label and categorize objects rapidly and, in most cases, correctly.' Acting as an 'intuitive scientist,' it seemed to me, as a practicing attorney, that if I could articulate the balance of factors considered in deciding whether a case had sufficient merit to warrant suit as a 'close call' or a 'close case,' not necessarily equal or balanced, then the 'possibility' or even 'probability' of failure should not be determinative of the legal and ethical decision to file the litigation.

*Id.* (footnotes omitted).

This whole notion of a "frivolous" claim is also problematic. The FJC study indicates that the amount of Rule 11 activity generated by a given federal district judge

Second, even assuming that frivolous litigation is a problem in the federal courts, federal district court judges themselves do not think that

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depends on that judge's assessment of the amount of frivolous litigation she is confronting. See Wiggins, *supra* note 37, at 13.

We found that the number of orders issued, either *sua sponte* or in response to a motion, is related to the judges' assessment of whether there is a problem with groundless litigation. That is, judges who see no problem or a slight problem report fewer orders for sanctions than do judges who see a greater problem. This suggests that variations in judicial use of Rule 11 are rationally related to the rule's purpose of deterring groundless litigation, or in the alternative, that some judges see a problem where other judges do not.

*Id.* (emphasis added). The difficulty, of course, is that whether a case is "frivolous" depends on how that term is defined; and, unfortunately, there is no clear definition. Instead, what is "frivolous" is left to each judge's subjective interpretation of the term. See, e.g., Tobias, *Revision*, *supra* note 20, at 197.

The problems of defining and applying the term "frivolous" remain . . . . When interpreting the 1983 version of Rule 11, judges formulated numerous articulations of the term, which ranged across a broad spectrum. Some courts strictly defined the concept, finding a "legally unreasonable filing to be frivolous." A similar number of courts leniently defined the term, stating that only legal contentions which are "baseless," "meritless," or have "no chance of success" can be frivolous. Most courts employed a rather moderate definition, holding that a complaint which was not "well-grounded in law" could be sanctioned as frivolous.

*Id.* (footnotes omitted). See also Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677, 682 (1999) ("[E]ven a brief survey of some of the standards articulated by the courts in a number of circuits reveals broad differences in formulation that betray both lack of uniformity among courts and a more general lack of a clearly defined standard for frivolous activity."); Yablon, *supra* note 45, at 65-66.

Frivolity is frowned upon in the world of civil litigation. Although the term "frivolous" never appears in the text of Rule 11 . . . , the determination that a claim is frivolous, and an objective determination at that, has been a primary criterion for imposing liability under Rule 11 for the last thirteen years. This raises the obvious question—exactly what makes a claim frivolous? . . . Not surprisingly, courts have had a fair amount of trouble developing standards for distinguishing frivolous cases from ordinary losers.

Yablon, *supra* note 45, at 65-66 (footnote omitted). See also Burbank, *Transformation*, *supra* note 61, at 1933 ("[S]o long as the abuses at which Rule 11 is directed are defined to include papers deemed legally frivolous, the detection of violations will be as determinate, and hence as uniform, as the notion of frivolousness itself.") (footnote omitted). As a result, we end up where we started, namely, with serious concerns about the amount of discretion vested in the federal district courts and its noted impact on Rule 11's chilling effects. See *supra* notes 56-60 and accompanying text.

Rule 11 is very effective in curbing it.<sup>526</sup> Instead, they find other tools to be much more effective. More specifically, the FJC study found that

Rule 11 is one of several devices available for controlling groundless litigation . . . . [W]hen we look at the judges' assessment of the *degree of effectiveness* of each device . . . , we find that Rule 11 does not compare especially well with most other tools for managing groundless litigation.

Although the judges find Rule 11 more effective than fee shifting, they find it less effective than the other devices we listed. The methods seen as most effective for controlling groundless litigation are prompt rulings on motions to dismiss and prompt rulings on motions for summary judgment (51% said "very effective" for each). Also effective are Rule 16 conferences to narrow issues (40% said "very effective"). In contrast, only 23% of the judges said Rule 11 is "very effective."<sup>527</sup>

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<sup>526</sup> See Wiggins, *supra* note 37, at 33.

Although most judges have found Rule 11 at least moderately effective as a deterrent to groundless litigation, the findings presented so far do not suggest a strong judicial endorsement for amended [1983] Rule 11. While only a minority of judges see a negative impact on the conduct of litigation, it is a sizable minority and suggests that at least some problem exists.

*Id.*

<sup>527</sup> *Id.* at 31 (emphasis in original); see also Vairo, *Where We Are*, *supra* note 27, at 481 (arguing that the FJC study "implies that frivolous litigation is no problem at all and that Rule 11 may not be the best cure for whatever ails the system"). Indeed, even the Advisory Committee appears to agree with the district courts' assessment that Rule 11 should not be the courts' primary means of curbing frivolous litigation. Vairo, *Where We Are*, *supra* note 27, at 494.

After considering the responses for its Call for Comments and the testimony taken at the public hearing, the Advisory Committee published an Interim Report that incorporated its findings . . . . The Interim Report also described some of the preliminary findings of the Federal Judicial Center Study and presented the Advisory Committee's Chair's preliminary observations on the questions in the Call for Comments. Some of the important observations were that: (1) Rule 11 should not be viewed as the primary means for controlling and deterring groundless litigation . . . .

*Id.*

Third, federal courts have a panoply of other sanctioning provisions at their disposal, should sanctions be warranted.<sup>528</sup> Fourth, and related, if litigants and/or the federal courts cannot satisfy Rule 11's procedural requirements, whether by motion or via order to show cause, there is a fairly strong indication from the case law that they will invoke other sanctioning authorities, particularly 28 U.S.C. § 1927 and the court's inherent power, to sidestep Rule 11 anyway.<sup>529</sup>

In light of all of the problems that Rule 11 continues to pose in the federal courts, particularly with respect to civil rights plaintiffs and their attorneys, and given all of the other factors discussed above, there should be further discussion about the fate of Rule 11. Should it be repealed? Should it be amended again and, if so, how?<sup>530</sup> In the interim, however, until these questions are answered once again, the federal courts should adopt high sanctioning thresholds in interpreting and applying Rule 11.

## 2. High Sanctioning Thresholds

"High sanctioning thresholds," as that term is used here, essentially describes interpretations of the 1993 amendments to Rule 11 that discourage both finding Rule 11 violations except in exceptional circumstances and using the Rule as a fee-shifting device. As a preliminary matter, therefore, it should be clear that "the abusive, not merely the wrong-headed, should be the targets of Rule 11"<sup>531</sup> and that

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<sup>528</sup> See *supra* text accompanying note 19; see also Marino, *supra* note 39, at 968 n.241.

The question also remains whether Rule 11 is the proper tool for punishing attorneys who file claims lacking a legal and factual foundation. Given the array of discretionary and statutory powers that federal judges possess, it is doubtful that Rule 11 is needed at all. Additionally, if we are indeed as litigious as some commentators have claimed, a rule like this only exacerbates the problem by giving attorneys and their clients one more issue to litigate.

Marino, *supra* note 39, at 968 n.241.

<sup>529</sup> The specific issue of whether § 1927 and the court's inherent power are being used to avoid or sidestep Rule 11's procedural requirements, and the interaction of these three sanctioning provisions generally, will be the subject of a forthcoming article.

<sup>530</sup> In 1991, a majority of the federal district court judges surveyed by the FJC indicated that they did not favor amending Rule 11 "to return its pre-1983 language," i.e., its subjective bad faith standard. Wiggins, *supra* note 37, at 34.

<sup>531</sup> Vairo, *Where We Are*, *supra* note 27, at 502.

in “close cases,”<sup>532</sup> Rule 11 sanctions should not be imposed at all.<sup>533</sup> Rule 11 is simply not intended to be a panacea for all of the perceived ills plaguing the civil litigation system.<sup>534</sup> Specific suggestions for high sanctioning thresholds are laid out in the next Parts of this Article.

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<sup>532</sup> According to Professor Armour, a close case for purposes of Rule 11 “is one in which after careful application of the rule, its underlying policies, commentary, and ‘precedent’; [sic] one judge might decide that sanctions are needed, another might not, and both decisions would stand up on appeal.” Armour, *Rethinking*, *supra* note 513, at 539-40 (footnote omitted).

<sup>533</sup> Professor Armour argues that, in close cases, Rule 11 sanctions should not be imposed because they would simply not be warranted, based on the acceptable norms of practice in that community. *Id.* at 553-54 (footnote omitted).

If practitioners and jurists could agree that the sanctions call was “close,” either because it was a close call on the adequacy of prefilings inquiry and analysis, on the merits whether factual or legal, on the purpose in bringing the litigation, or on the need to sanction for deterrent purposes, there should not be sanctions.

*Id.*

In a Rule 11 case where this level of uncertainty can be articulated and disagreement within the interpretive community predicted or projected—if the trial judge can consciously articulate the proposition that some portion of the professional interpretive community would disagree with the decision to sanction—it cannot be said that the lawyer has violated the acceptable norms of practice in a manner requiring sanctions.

*Id.* at 555 (footnote omitted). See also Tobias, *Revision*, *supra* note 20, at 212-13.

One critical means of achieving the goal of minimizing the Rule’s use would be for courts to eschew sanctions in all situations involving Rule 11 violations which could be characterized as less than serious. Helpful, straightforward examples are those types of activities described as insignificant infractions when parsing papers for the purpose of ascertaining whether Rule 11 is triggered. Similarly illustrative are prefilings inquiries that implicate simple negligence, papers which include one comparatively unimportant legal contention that is rather frivolous, and papers which include relatively few mistakes in factual allegations which are not material. These examples are intentionally overdrawn to illustrate the phenomena which are clearly less than serious; judges should treat considerably worse activity as insufficiently serious to warrant sanctions.

*Id.*

<sup>534</sup> See, e.g., *Sakon v. Andreo*, 119 F.3d 109, 115 (2d Cir. 1997) (Rule 11 “‘does not license a district court to sanction any action by an attorney or party that it disproves of . . . .’”) (ellipsis in original) (citation omitted); *Lopez v. Constantine*, No. 94 CIV. 5921 DAB, 1997 WL 793595, at \*1 (E.D. Pa. Dec. 23, 1997) (“Rule 11 cannot be used to sanction an attorney’s ‘obnoxious’ conduct toward another attorney, even if it forces an adversary to make motions which would otherwise be unnecessary.”).

## a. The Rule 11 Motion

A warning letter is *not* sufficient to trigger the safe harbor provision of Rule 11.<sup>535</sup> *But*, the party who intends to move for Rule 11 sanctions should be required, as a preliminary matter, to provide informal notice to the other party, preferably in writing, before it prepares and serves its Rule 11 motion. This is the position taken by the Advisory Committee, commentators, and at least a couple of federal district courts.<sup>536</sup> If the informal warning is unsuccessful, then the party seeking Rule 11 sanctions must be required to prepare a separate sanctions motion, which can, in accordance with the Sixth Circuit's position,<sup>537</sup> include alternative bases of sanctions, in addition to Rule 11. The sanctions motion must then be served on the opposing party, and only this service will trigger Rule 11's safe harbor period.<sup>538</sup> If a separate Rule 11 motion is not served prior to filing, then that motion *must* be denied.

After service, the moving party should, as a general rule, be required to wait a full twenty-one days before filing its Rule 11 motion with the court. The twenty-one days is important because it provides the non-moving party with time to conduct additional investigation if required

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<sup>535</sup> See *supra* notes 76-77, 136-37.

<sup>536</sup> See FED. R. CIV. P. 11, advisory committee's note (1993) ("In most cases . . . counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion."); *Harding Univ. v. Consulting Serv. Group*, 48 F. Supp. 2d 765, 770 (N.D. Ill. 1999) (noting in the context of a moving party's duty to mitigate that "[c]ounsel is even expected to give informal notice to the opposing party whether in person, by telephone, or letter, of a potential violation before preparing and serving a Rule 11 motion"); *Two Men & a Truck/Int'l Inc. v. Two Men & a Truck/Kalamazoo, Inc.*, No. 5:94-CV-162, 1996 WL 740540, at \*2 (W.D. Mich. Oct. 16, 1996).

[A]lthough plaintiff's counsel requested defendants' counsel by letter on December 6, 1995, to withdraw the motion to modify the preliminary injunction, the 'safe harbor' period begins to run only upon service of the motion. *In fact, plaintiff's counsel should be expected to give this type of notice to defendants' counsel prior to preparing and serving a Rule 11 motion.*

*Two Men & a Truck/Int'l*, 1996 WL 740540, at \*2 (emphasis added) (citation omitted). See also *Simpson*, *supra* note 22, at 504 ("When appropriate, an attorney should encourage, in writing, opposing counsel to investigate possible factually or legally infirm positions using the threat of Rule 11 sanctions."); *Yamamoto & Hart*, *supra* note 26, at 88 (arguing that "[e]arly notice, in any reasonable form, makes eminent sense" because it may well avoid the need for a later sanctions motion).

<sup>537</sup> See *supra* text accompanying notes 147-49.

<sup>538</sup> See *supra* text accompanying notes 77-79, 136-37.



or an internal review of the challenged contention, etc. At the same time, Rule 11 does “contemplate[ ] situations in which it may be difficult or impossible to comply with the 21 day provision,”<sup>539</sup> for example, when a Rule 11 motion is filed in response to a complaint.<sup>540</sup> In these situations, however, the burden should be placed squarely on the party seeking Rule 11 sanctions to request a variance from the court from the twenty-one day safe harbor period either by moving to extend time to give it more than twenty days to file its answer (or other paper, depending on the circumstances) or to shorten time to file its Rule 11 motion.<sup>541</sup> Variances should only be requested and granted under circumstances that make waiting a full twenty-one days before filing the Rule 11 motion in court impracticable, for example, where the targeted pleading, motion, or other paper is one that has less than a twenty-one day response time, such as a complaint. If such a variance is not requested, then the Rule 11 motion must be denied if it is filed in court before twenty-one days have elapsed since service.<sup>542</sup> In short, the fact that a full twenty-one days is not available for serving *and* filing a Rule 11 motion should not be interpreted as a reason to circumvent the safe harbor provision of the Rule.<sup>543</sup> This sanctioning threshold, therefore,

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<sup>539</sup> *Neighbors Concerned About Yacht Club Expansion v. Grosse Pointe Yacht Club*, No. 99-70325, 1999 U.S. Dist. LEXIS 8646, at \*28 (E.D. Mich. May 26, 1999). The Rule provides in pertinent part that Rule 11 motions “shall not be filed with or presented to the court unless within 21 days after service of the motion (*or such other period as the court may prescribe*), the challenged paper . . . is not withdrawn or appropriately amended.” FED. R. CIV. P. 11(c)(1)(A) (emphasis added).

<sup>540</sup> Defendants are required to file their answers to a complaint within twenty days after service. FED. R. CIV. P. 8. Given that Rule 11’s safe harbor period is twenty-one days, it would be impossible to comply with it if the pleading being targeted is the complaint.

<sup>541</sup> Clearly, the higher threshold would be to require the party seeking sanctions to move to extend time, thereby allowing the non-moving party to take full advantage of the entire twenty-one day safe harbor period.

<sup>542</sup> See, e.g., *Grosse Point Yacht Club*, 1999 U.S. Dist. LEXIS 8646, at \*29. In denying defendants’ Rule 11 motion, the district court stated that defendants “did not have an opportunity to comply with the safe harbor provision because only 11 days passed between the filing of the motion for preliminary injunction and the hearing on that motion.” *Id.* “However, in accordance with the rule, the [defendants] could have requested a variation from the time period, but failed to do so.” *Id.* (emphasis added).

<sup>543</sup> My colleague Katherine C. Sheehan points out that a strict construction of the safe harbor provision along the lines that I have suggested above can be problematic in a couple of different respects. First, requiring the party seeking Rule 11 sanctions to file a motion to shorten or extend time would impose additional burdens on the litigants and the court—more paperwork would be created, and more time and expense would be required to draft and resolve this other motion. Second, and perhaps more troubling, she notes that the safe harbor provision does not work well with motions and other papers that have less than a

specifically rejects the holding and reasoning of cases like *Religious Technology Center v. Gerbode*.<sup>544</sup>

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twenty-one day response time. Consequently, the type of paper that will probably be targeted most frequently for Rule 11 sanctions will be pleadings, with the most likely target in this category of documents being complaints. Complaints are already targeted more frequently than other documents. A strict construction of the safe harbor provision, therefore, may increase this frequency, which is very problematic for civil rights plaintiffs. I believe that Professor Sheehan's comments are well-taken. A strict construction of the safe harbor provision may very well create unlooked-for problems. I remain convinced, however, that the best interpretation of the safe harbor provision, and the 1993 amendments to Rule 11 in general, is one that *decreases* the chances of Rule 11 sanctions being imposed. A strict interpretation that *requires* a party to comply with the safe harbor provision, or file a motion to extend or shorten time, before filing its motion for Rule 11 sanctions, comports with this philosophy. Failing either of these options, that party's motion should be denied.

<sup>544</sup> No. CV 93-2226 ANT, 1994 WL 228607 (C.D. Cal. May 2, 1994). In *Religious Technology Center*, defendants' filed a Rule 11 motion in response to plaintiff's complaint. *Id.* at \*1. The motion was filed a month after the case was dismissed and, more importantly, in violation of Rule 11's safe harbor provision. *Id.* The district court granted defendants' Rule 11 motion over plaintiff's safe harbor objection. *Id.* at \*2, \*5. According to the district court, it simply was not "practicable" to require defendants to comply with the safe harbor provision when the pleading at issue was the complaint. *Id.* at \*2. The district court elaborated on its position in a footnote:

It would appear to be problematical [sic] to comply with the "safe harbor" provision in any case involving a challenge to a complaint. Even if the frivolousness is immediately apparent on the face of the pleading at the time of service, does service of a motion for sanctions under Rule 11 toll the 20-day period to answer under Rule 12(a)(1)(A)? If not, what purpose does compliance with the "safe harbor" provision serve if the complaint must be responded to before the 21-day waiting period expires? If the frivolousness is not immediately apparent and the Rule 11 motion is not made until after the complaint is dismissed, what useful purpose is served by compliance with the "safe harbor" provision at that point? Certainly, by that juncture, it is too late for the complaint to be "withdrawn or appropriately corrected."

*Id.* at \*2 n.6.

The district court questions the purpose served by the safe harbor provision, at least as that provision is applied to complaints. The purpose of the provision, regardless of the pleading, motion, or other paper at issue, is made abundantly clear by the Advisory Committee, which writes that

these provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

FED. R. CIV. P. 11 advisory committee's note (emphasis added). There are also two responses with respect to the more specific points made by the district court in its footnote.

Finally, the federal courts should follow the approach suggested by the Advisory Committee and adopted by the Third Circuit via its supervisory rule and by the Sixth Circuit in *Ridder*, which require all Rule 11 motions to be served *and* filed prior to final disposition of the case.<sup>545</sup> Thus, if a Rule 11 motion is not served *and* filed prior to final judgment, that motion should be denied.

Requiring service of the motion prior to final judgment is absolutely critical if the safe harbor provision is to have any effect at all. The reason for this conclusion is simple—the safe harbor provision literally presupposes that there is “a pleading, written motion, or other paper” that can in fact be amended or withdrawn.<sup>546</sup> If it is too late to amend or withdraw the challenged contention, i.e., because final judgment has already been entered, then the safe harbor provision would serve no useful purpose whatsoever. A litigant would no longer be able to avoid sanctions by correcting the alleged violation because there would be nothing left to correct, and this would defeat the very reason the safe harbor was added in 1993. An interpretation that permitted service of the motion after final judgment, therefore, would, in effect, write the safe harbor provision, which is the heart of the 1993 amendments, out of the rule.<sup>547</sup>

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First, the sanctioning threshold discussed in the text above, namely, requiring the party seeking sanctions to request a variance from the twenty-one day safe harbor period, specifically resolves the district court’s concern that compliance with the safe harbor provision is impracticable when the challenged pleading is the complaint. Second, the district court’s concern that compliance with the safe harbor is “impracticable” once the complaint has been dismissed is addressed and resolved by another sanctioning threshold, namely, requiring Rule 11 motions to be served and filed prior to final disposition of the case. *See infra* text accompanying notes 548-51.

<sup>545</sup> See, e.g., FED. R. CIV. P. 11 advisory committee’s note (“Given the safe harbor provisions . . . , a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).”); *supra* text accompanying notes 234-38 (Third Circuit); *supra* text accompanying notes 196-217 (Sixth Circuit).

<sup>546</sup> See Vairo, *Prologue*, *supra* note 83, at 65. Professor Vairo states what should otherwise be obvious when she writes that, “[u]nder the 1993 amendment, a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn.” *Id.* (footnote omitted).

<sup>547</sup> *Gazouski v. Belvidere*, No. 93 C 20157, 1995 WL 149438, at \*2 (N.D. Ill. Apr. 3, 1995).

[T]he court denies defendants’ motion for attorney fees and costs because defendants did not serve their motion under Rule 11 until after the conclusion of the case. The advisory notes expressly prohibit the service of a Rule 11 motion after the conclusion of the case. *To*

A party seeking Rule 11 sanctions should also be required to file its motion prior to final judgment. This approach definitely represents a high sanctioning threshold because it would deny Rule 11 sanctions to litigants who fail to take prompt action once a Rule 11 violation is discovered.<sup>548</sup> From a more tactical standpoint, this threshold also aims to prevent the party seeking sanctions from taking advantage of hindsight by only filing the Rule 11 motion if, as it turns out, she is actually the prevailing party.<sup>549</sup> From a fairness standpoint, if the Rule 11 violation is that clear, the moving party should be required to file its motion prior to final judgment and thereby expose herself to a potential Rule 11 violation should that motion later be denied *and* be deemed to have *not* satisfied Rule 11's certification requirements.<sup>550</sup> If further factual development is necessary to determine whether Rule 11 has been violated, then the district court can simply take the Rule 11 motion under advisement until such time as the necessary facts are made clear through discovery or even trial. The district court should, however, be extremely cautious in imposing Rule 11 sanctions, particularly if it decides not to rule on the motion until after final judgment.<sup>551</sup>

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*allow defendants to do so under these circumstances would circumvent the 'safe harbor' provision which is at the heart of the new Rule 11.*

*Id.* (emphasis added) (footnote omitted). See also *supra* text accompanying notes 197-238 (discussing the Third, Sixth, and Ninth Circuits' positions regarding service prior to filing).

<sup>548</sup> This approach is consistent with the one suggested by the Advisory Committee. See FED. R. CIV. P. 11 advisory committee's note ("Ordinarily the motion should be served promptly after the inappropriate paper is filed and, if delayed too long, may be viewed as untimely.").

<sup>549</sup> It is critical to keep in mind that a challenged contention does not violate Rule 11 simply because it "loses" in court. Most Rule 11 sanctions, however, whether by motion or via order to show cause, are almost always going to be directed at losing cases. Cf. Yablon, *supra* note 45, at 87 ("Winning cases almost never get sanctioned."). Extreme caution must therefore be employed in deciding whether a "losing claim" is also sanctionable under Rule 11 because, as Professor Yablon points out, "the likelihood that a claim will be sanctioned as frivolous seems directly correlated with the likelihood that the claim will be a loser." *Id.*

<sup>550</sup> A Rule 11 motion is itself subject to the requirements of the Rule. This Rule 11 liability is only "potential," however, because, as previously noted, a Rule 11 violation should not be automatically established just because the motion loses. See *supra* note 549.

<sup>551</sup> The case of *United National Insurance Co. v. R & D Latex Corp.*, 242 F.3d 1102 (9th Cir. 2001), makes this very point. The Ninth Circuit wrote,

The fact that the district court later altered its views concerning the key legal issue and thereupon concluded—in the same order in which the district court announced its new legal analysis concerning the impact of the reimbursement claim on the jurisdictional issue—that Rule 11 sanctions were appropriate illustrates, if anything, one of the reasons

## b. Orders to Show Cause

The potential for “chilling” appears to be especially great when it comes to orders to show cause for the following reasons: decisions as to whether to issue them (and for what purpose) and whether to sanction pursuant to them are left entirely to the discretion of the federal district courts;<sup>552</sup> a much higher percentage of orders to show cause result in the imposition of Rule 11 sanctions, compared to the success rate for Rule 11 motions;<sup>553</sup> the sanction of choice, even when such sanctions are prohibited by the plain language of Rule 11, appears to be attorneys’ fees;<sup>554</sup> and there is no safe harbor provision to protect a litigant whom the court concludes has violated Rule 11.<sup>555</sup>

The first part of the solution to this aspect of the “chilling” problem, therefore, is to require all federal district courts to actually issue orders to show cause; and *all* orders to show cause must be required to satisfy due

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courts must be cautious in imposing Rule 11 sanctions. *Even when we begin with an open mind, . . . many of us, lawyers and judges alike, have difficulty in recognizing opposing legal arguments as plausible once we have thought through an issue and come to a firm conclusion regarding the proper legal principles applicable to a particular transaction.*

*Id.* at 1117 (reversing sua sponte Rule 11 sanctions) (emphasis added).

<sup>552</sup> See *supra* text accompanying notes 480-85.

<sup>553</sup> See *supra* text accompanying notes 433-34.

<sup>554</sup> See *supra* Part III.A.2.c., B.4.b.

<sup>555</sup> In *United National Insurance Co.*, for example, the Ninth Circuit recognized that Rule 11 had to be strictly construed, especially when the district court acted on its own initiative *because there was no safe harbor available to protect the litigant in those situations.* 242 F.3d at 1115-16. The Ninth Circuit wrote,

Judges . . . should impose sanctions on lawyers for their mode of advocacy only in the most egregious situations, lest lawyers be deterred from vigorous representation of their clients. In recognition of [this] critical concern, Rule 11 sanctions may be imposed only in response to claims that are not “warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law.” *This standard is applied with particular stringency where, as here, the sanctions are imposed on the court’s own motion. In that circumstance—unlike the situation in which an opposing party moves for Rule 11 sanctions—there is no “safe harbor” in the Rule allowing lawyers to correct or withdraw their challenged filings.*

*Id.* (citations omitted) (emphasis added); see also, FED. R. CIV. P. 11 advisory committee’s note (“Since show-cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a ‘safe harbor’ to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court’s own initiative.”).

process, which, at a minimum, must include: (1) particularized notice of the conduct alleged to be sanctionable; (2) particularized notice of the authority or authorities under which sanctions are being sought; and (3) opportunity to respond.<sup>556</sup> The district courts should also be required to issue their orders to show cause as a separate written order. This latter requirement, while not explicitly required by Rule 11 or the case law interpreting the 1993 amendments,<sup>557</sup> is intentionally raised here as a high sanctioning threshold, but one that would also make clear to the parties, their attorneys, and the appellate courts that due process was in fact satisfied.<sup>558</sup>

Second, and very importantly, *attorneys' fees cannot, and must not, be awarded* pursuant to an order to show cause. The language of the Rule explicitly prohibits this type of monetary sanction from being awarded when the court acts on its own initiative,<sup>559</sup> and there should be absolutely no exceptions from this rule in the federal courts.<sup>560</sup>

Third, orders to show cause should not be issued in circumstances in which it seems clear that such an order is being used to sidestep Rule

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<sup>556</sup> See *supra* Part III.A.2.a.

<sup>557</sup> See *supra* text accompanying notes 317-20.

<sup>558</sup> More specifically, requiring the district courts to issue separate written orders to show cause would achieve two related and important objectives. First and foremost, it would ensure that due process was in fact satisfied because the federal circuit courts would have a clear record, i.e., the order itself, by which to decide that issue. Second, and assuming due process was in fact satisfied by the order, this result would preclude the parties and their attorneys from being able to argue later that their rights were somehow violated by the sanctioning process employed by the district courts.

<sup>559</sup> See *supra* notes 98-100 and accompanying text.

<sup>560</sup> Limiting the federal district courts' use of attorneys' fees would be an important step in reducing the use of Rule 11 as a fee-shifting device and, hence, may reduce the impact of one of the factors contributing to Rule 11's chilling effects. See *infra* Part IV.B.2.c. The district courts may, however, require a sanctioned party to "pay a penalty into court." See FED. R. CIV. P. 11(c)(2). As Professor Tobias points out, "[c]ivil rights plaintiffs who would be exposed to less risk of being assessed attorney's fees may remain concerned about having to pay a monetary penalty into court, because they probably would be indifferent as to the assessment's recipient." Tobias, *Plaintiffs*, *supra* note 31, at 1788. Despite the fact that fines paid into court will probably be substantially less than the amounts that are awarded as attorneys' fees, Professor Tobias makes a very good point. As long as monetary sanctions, whether in the form of attorneys' fees to the opposing party or penalties paid into court, remain the Rule 11 sanction of choice in the federal courts, civil rights plaintiffs will continue to be "risk averse and vulnerable to such deployment of the Rule." *Id.*

11's motion requirements.<sup>561</sup> There are two reasons, one policy-driven and one tactical, that should compel this result. As a matter of policy, to permit orders to show cause to be issued to get around Rule 11's motion requirements would literally render the motion requirements meaningless. Such an interpretation would, in effect, read the motion requirements out of the Rule.<sup>562</sup> Second, the tactic of seeking and/or issuing an order to show cause under the circumstances described above, should be fruitless anyway. That is, what appears to motivate the party in seeking and/or the district court in issuing the order to show cause in these situations is a desire to obtain and/or award attorneys' fees as a Rule 11 sanction.<sup>563</sup> As previously discussed, this type of sanction is simply not available when a court acts on its own initiative.<sup>564</sup>

Finally, the Third Circuit's approach with respect to *when* an order to show cause must be issued should be adopted. More specifically, as with a Rule 11 motion, the federal district courts should be required to issue their orders to show cause prior to final judgment. This sanctioning threshold is consistent with the Advisory Committee's philosophy that a Rule 11 violation should be called to the offending party's attention as soon as practicable after its discovery.<sup>565</sup> There is simply "no reason why prompt action should be required of an opposing party and yet not similarly required of the court."<sup>566</sup> This approach will also avoid the problem of hindsight and, as the Third Circuit points out, piecemeal appeals of the merits and sanctions questions.<sup>567</sup> As with a Rule 11 motion, the district court can decide whether to impose sanctions

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<sup>561</sup> In other words, if a party either failed to file a Rule 11 motion or filed one that did not satisfy the Rule's procedural requirements for motions, an order to show cause should not be issued to avoid either or both of those Rule 11 motion problems. See *supra* Part III.A.2.c, B.4.a (discussing this "phenomenon" in the federal district courts.).

<sup>562</sup> See *supra* text accompanying notes 348-52 (discussing Ninth Circuit cases).

<sup>563</sup> See *supra* Part III.A.2.c, B.4.a-b.

<sup>564</sup> Thus, if attorneys' fees are simply not available pursuant to an order to show cause, the number of situations in which parties and/or the district courts attempt to sidestep Rule 11's motion requirements should be greatly reduced.

<sup>565</sup> See FED. R. CIV. P. 11 advisory committee's note ("Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely.").

<sup>566</sup> *Simmerman v. Corino*, 27 F.3d 58, 63 (3d Cir. 1994).

<sup>567</sup> See *supra* note 333-37 and accompanying text.

pursuant to its order to show cause after the case has reached final judgment, if necessary.<sup>568</sup>

c. Deterrence, Discretion, and “Appropriate” Sanctions

As previously discussed, the research conducted here supports a finding that Rule 11 is still being used as a fee-shifting device, despite the 1993 amendments.<sup>569</sup> This over-emphasis on monetary sanctions is unsettling and problematic, for several reasons. First, the text of Rule 11 explicitly limits the use of monetary sanctions.<sup>570</sup> Second, the Advisory Committee Note makes clear that monetary sanctions should not be the sanction of choice in the federal courts and, instead, should be reserved for “unusual circumstances.”<sup>571</sup> Finally, encouraging monetary sanctions will only serve to perpetuate and encourage Rule 11’s chilling effects, which is antithetical to one of the reasons for the 1993 amendments to Rule 11.<sup>572</sup>

This over-reliance on monetary damages, and specifically attorneys’ fees, also suggests very powerfully that the federal courts are using Rule 11 to compensate litigants. The obvious problem with a compensation rationale is that the clearly articulated primary purpose of Rule 11 sanctions is to deter, *not* to compensate.<sup>573</sup> This emphasis on compensation also misperceives the harm Rule 11 seeks to remedy. More specifically, a compensation rationale for Rule 11 essentially focuses “on the harm done the defendant by a frivolous pleading . . . .”<sup>574</sup> As Professor Kelleher points out, however, “recent rulings of the Supreme Court and the Committee Notes to the 1993 amendments, are based on a different assumption—that Rule 11 is not primarily concerned with harm to parties, but with the harm done to the court and the judicial system by frivolous filings.”<sup>575</sup>

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<sup>568</sup> See *supra* text accompanying notes 548-51 (urging caution in imposing Rule 11 sanctions after final judgment).

<sup>569</sup> See *supra* Part III.A.3, B.4.c.

<sup>570</sup> See *supra* text accompanying notes 94-100.

<sup>571</sup> See FED. R. CIV. P. 11 advisory committee’s note.

<sup>572</sup> See *supra* text accompanying notes 66-69.

<sup>573</sup> See, e.g., FED. R. CIV. P. 11 advisory committee’s note; *supra* text accompanying notes 84-86.

<sup>574</sup> Kelleher, *supra* note 74, at 71.

<sup>575</sup> *Id.*



At a minimum, it must be made absolutely clear to the federal courts, and the attorneys and parties appearing before them, that deterrence, *not* compensation, is Rule 11's most important goal. The deterrence rationale can be reinforced in a couple of ways: first, by encouraging, if not requiring, the use of non-monetary sanctions<sup>576</sup> and, second, by requiring very specific findings on the record *anytime* the federal district courts decide to impose Rule 11 sanctions of any kind.<sup>577</sup> According to Judge Sam Johnson of the Fifth Circuit Court of Appeals, those findings should include:

- (1) what pleading, motion, or other paper is in violation of Rule 11,
- (2) why it is in violation,
- (3) what factors the court considered in choosing an appropriate sanction,<sup>[578]</sup>

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<sup>576</sup> The use of non-monetary sanctions under Rule 11 is expressly encouraged by the Advisory Committee. Some of the non-monetary sanctions specifically mentioned by the Committee, include:

striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc.

FED. R. CIV. P. 11 advisory committee's note; *see also supra* text accompanying notes 96-97.

<sup>577</sup> Should findings be required when district courts decide not to impose Rule 11 sanctions? The short answer is, no. Findings should not be required when a district court denies Rule 11 sanctions because the text of Rule 11 does not require findings under these circumstances; a Rule 11 movant does not have *the right* to a sanctions award, and a district court's decision whether to impose Rule 11 sanctions, even if a violation is found, is discretionary, not mandatory, under the 1993 version of the Rule. *See Vairo, Prologue, supra* note 83, at 62. Notwithstanding these reasons and the fact that not requiring findings when sanctions are denied clearly represents a higher sanctioning threshold, a couple of the circuits examined here, namely the Seventh and Ninth Circuits, require such findings by the district courts. *See supra* note 407. If such findings are going to be required in practice, the district courts should only be required to provide a reasoned basis for denying sanctions.

<sup>578</sup> The Advisory Committee provides a non-exhaustive list of factors a court should consider in deciding whether to impose a sanction, including:

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation;

- (4) what sanctions, if any, were considered and rejected, and
- (5) why the court believes that the sanction imposed is the least severe sanction necessary to deter similar misconduct.<sup>579</sup>

When a district court decides to award monetary sanctions for a Rule 11 violation, the district courts should also be required to include findings specifying why a non-monetary sanction would not be sufficient to deter the violation at issue, documenting the reasonableness of the fees sought or fine imposed, and documenting the party or attorney's ability to pay.<sup>580</sup>

Emphasizing non-monetary sanctions and requiring specific findings to support an award of Rule 11 sanctions will constrain, *without overriding*, the exercise of discretion by the federal district courts. This sanctioning threshold therefore attempts to balance two competing considerations. On the one hand, the federal district courts must have discretion to control the litigants and litigation before them. On the other hand, the amount of discretion invested in the federal district courts is one of the main reasons cited for Rule 11's chilling effects.<sup>581</sup> The balance struck under this sanctioning threshold would simply require the federal district courts to explain the use of their discretion when they decide to impose Rule 11 sanctions.<sup>582</sup> Such a requirement

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whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law . . . .

FED. R. CIV. P. 11 advisory committee's note.

<sup>579</sup> Johnson, *supra* note 63, at 674 (footnote added).

<sup>580</sup> These additional findings are either expressly mentioned in the following sources or are clearly suggested by them. See, e.g., FED. R. CIV. P. 11 advisory committee's note (stating that the court should consider "what amount, *given the financial resources of the responsible person*, is needed to deter that person from repetition in the same case") (emphasis added); Yamamoto & Hart, *supra* note 26, at 84-85.

<sup>581</sup> See *supra* text accompanying notes 55-60.

<sup>582</sup> According to Judge Johnson,

Although it may seem somewhat bothersome to require district courts to consider each of these issues and to note their conclusions for the record, the requirement is well justified. First, the bother is not that great. The factors listed are the factors a district court ought to consider in any event when imposing sanctions; all that is required here is that the court make a record of its deliberations. Second, given

will hopefully get the federal courts to “tak[e] seriously the duty to exercise discretion in selecting a sanction *appropriate to the goal of deterrence* . . . .”<sup>583</sup> The approach that seems to be employed by the federal courts now, i.e., routine use of Rule 11 as a fee-shifting device, is not only inconsistent with the district courts’ duty, it is also unacceptable.<sup>584</sup> Implementing this sanctioning threshold will probably not be easy,<sup>585</sup> but it must be done.<sup>586</sup>

#### d. Discretion and Appellate Review

The federal district courts’ exercise of discretion is widely believed to be one of the main causes of Rule 11’s chilling effects.<sup>587</sup> The question, of course, is how to constrain a district court’s discretion without unnecessarily impeding the court’s ability to manage its own docket.

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the potential size and effect of Rule 11 sanctions, a certain amount of care is warranted in the imposition of sanctions. Third, factual findings on each of these . . . issues would encourage federal district courts to consider more seriously the least sanction adequate doctrine, a doctrine which, if fully implemented, would eliminate the worst of the problems with the present rule.

Johnson, *supra* note 63, at 674.

<sup>583</sup> Burbank, *Transformation*, *supra* note 61, at 1942 (emphasis added).

<sup>584</sup> *Id.* at 1934. It is also “inconsistent with the trial court’s duty to exercise discretion in selecting a sanction appropriate to the goal of specific deterrence and its duty to avoid over-deterrence, specific or general.” *Id.* (footnote omitted).

<sup>585</sup> *Id.* at 1942 (“[T]aking seriously the duty to exercise discretion in selecting a sanction appropriate to the goal of deterrence, as opposed, for instance, to routine expense-shifting on an attorney’s fee model, will not be a simple exercise for judges, which may help to explain why so many of them have shirked that duty.”).

<sup>586</sup> According to Professor Burbank,

The difficulty has not to do with the doctrine but with the agony of judgments about human conduct and what is likely to affect conduct, both of the individuals before the court and of others. But, again, that is a duty that the Rule imposes and, more important for present purposes, a reason it does so is evidently awareness of the differential impact of sanctions, whether viewed from the perspective of specific or general deterrence. From those perspectives, predictability is critical, and it cannot be achieved through routine, let alone uniform, resort to expense-shifting as a sanction under Rule 11.

*Id.* (footnotes omitted).

<sup>587</sup> See *supra* text accompanying notes 55-60.

One of the most effective methods to limit the district courts' exercise of discretion is rigorous appellate review.<sup>588</sup>

But, if rigorous appellate review is needed to curb judicial discretion in the district courts and, hence, reduce some of the problems associated with Rule 11, the question remains how to accomplish that. Based on the Rule 11 literature and commentary, at least three things would need to happen to increase the level of appellate scrutiny. First, the federal appellate courts have to *publish clear and consistent Rule 11 opinions*.<sup>589</sup> Second, the federal circuit courts have to insist that the district courts comply with Rule 11's findings requirement.<sup>590</sup> Third, the federal

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<sup>588</sup> See, e.g., Wiggins, *supra* note 37, at 13 (finding that the district court judges themselves indicate that their decisions about whether to increase or decrease use of Rule 11 sanctions is directly linked to the mandates of the federal appellate courts.); see also *infra* note 589.

<sup>589</sup> Federal district court judges surveyed in the FJC study "generally expressed unhappiness with appellate rulings" and the impact they had on Rule 11 practice in the federal courts. Wiggins, *supra* note 37, at 36. One judge commented that "[t]he courts of appeals have a great deal of blame to shoulder in the almost total lack of confidence in the trial judge's ability to recognize the need for sanctions in particular cases." *Id.* Another judge said that "[i]t is useless to have Rule 11 when it is never enforced at the appellate level." *Id.* The solution, or at least part of one, is spelled out in yet another comment by a district court judge who stated,

While I do not suggest that Rule 11 has no beneficial effect in discouraging frivolous litigation, *I do feel that consistent, precedential decisions at the appeals court level will greatly assist trial courts in correctly applying Rule 11. Moreover, clear and consistent published opinions would provide guidance to attorneys practicing in federal court as to the standards they are expected to meet.*

*Id.* (emphasis added).

<sup>590</sup> According to Professor Armour,

Appellate review is deemed essential . . . to ensure that the correct decision was reached, or at least that everything was done to ensure that the [district] court arrived at the best decision possible. The assumption that underlies the adjudicative process is that the openness and thoroughness of the analysis at the trial court level, when coupled with a commitment to provide a detailed record for appeal, fosters judicial neutrality, objectivity, and adherence to external legal standards. This element of public and institutional scrutiny is intended to restrict the courts' reliance upon highly personalized, subjective, or internalized standards or the influence of bias in reaching the final result.

Armour, *Practice*, *supra* note 55, at 728. See also Yamamoto & Hart, *supra* note 26, at 89. Professors Yamamoto and Hart argue, in the context of the 1983 version of Rule 11, which did not have an explicit findings requirement, that

findings and a statement of reasons . . . are deemed necessary for appellate review, "demonstrating that the trial court exercised its

appellate courts must conscientiously decide how the “abuse of discretion” standard should be applied to *each* Rule 11 case they review. This last suggestion requires some further explanation.

Abuse of discretion is the standard of review currently applicable to all Rule 11 decisions by the district courts.<sup>591</sup> The abuse of discretion standard of review was adopted by the United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*,<sup>592</sup> and endorsed by the Advisory Committee with respect to the 1993 amendments to the Rule.<sup>593</sup> Many commentators argue that this standard of review is simply not rigorous enough, and that, as a result, Rule 11’s problems will continue in practice.<sup>594</sup> If Rule 11 is amended further, then perhaps the question of

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discretion in a reasoned and principled fashion.” Findings serve additional functions. “[T]hey help to assure litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation; and . . . their publication enhances the deterrent effect of the ruling.”

Yamamoto & Hart, *supra* note 26, at 89 (ellipses in original); *see supra* text accompanying notes 24-25 (discussing the potential benefits of Rule 11’s findings requirement).

<sup>591</sup> *See supra* text accompanying notes 127-28.

<sup>592</sup> 496 U.S. 384 (1990).

<sup>593</sup> *See supra* text accompanying notes 127-28.

<sup>594</sup> *See, e.g.,* Tobias, *Plaintiffs*, *supra* note 31, at 1785.

[Abuse of discretion as the applicable standard of review for Rule 11 decisions] place[s] too much discretion in trial courts and prescribe[s] insufficiently demanding review. It simply lacks adequate rigor, especially for monitoring determinations of district judges who vigorously apply the Rule against civil rights plaintiffs. Indeed, overly deferential review of such decisions in recent high profile cases tellingly illustrates these problems.

*Id.* (footnotes omitted). *See also* Evan S. Nadel, *The Amended Federal Rule of Civil Procedure on Appeal: Reconsidering Cooter & Gell v. Hartmarx Corporation*, 1996 ANN. SURV. AM. L. 665, 668, 669-70 (1996) (arguing that the abuse of discretion standard “fosters—indeed mandates—inappropriate review of sanctions.”). According to Nadel,

The abuse of discretion standard of review that the Supreme Court was determined should apply to every facet of Rule 11 was devised under the 1983 version of the Rule. However, since the Advisory Committee endorsed that unitary standard in its 1993 notes, the standard has been unquestioningly applied to the more technical 1993 version of the Rule. This failure to reconsider the appropriate standard of review under the 1993 Rule has resulted in bad justice and a potentially crippled judicial ability to control the legal system and its participants.

Nadel, *supra* (footnotes omitted). *See also* Simpson, *supra* note 22, at 512.

[T]o effectuate the “least-severe sanction adequate” provision, the Rule must provide for more rigorous appellate review . . . . Circuits have, in

which standard of review should be applicable to Rule 11 decisions by the district courts will be revisited. Until then, however, abuse of discretion remains the applicable standard of review for all aspects of a district court's Rule 11 decision and, therefore, has to be addressed.

As previously discussed, there are different formulations of this standard in use in the federal courts.<sup>595</sup> Senior Judge Henry J. Friendly of the Second Circuit argues that "the differences are not only defensible but essential" because "[s]ome cases call for application of the abuse of discretion standard in a 'broad' sense and others in a 'narrow' one."<sup>596</sup> According to Judge Friendly, therefore,

In those situations "where the decision depends on first-hand observation or direct contact with the litigation," the trial court's decision "merits a high degree of insulation from appellate revision." At the other extreme, when Congress has declared a national policy and enlisted the aid of the courts' equity powers in its enforcement, the Supreme Court has said that the fact that "the [trial] court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." In some instances, the need for uniformity and predictability demand thorough appellate review. In short, the "abuse of discretion" standard does not give

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the past, articulated a "least-severe sanction adequate" policy . . . ; nonetheless, district courts still award excessive monetary judgments. Thus, as the circuit court relies on the discretion of the district court and the district court sidesteps the recommendations of the circuit court, the "least severe sanction adequate" policy is not realized. Based on this exception, the proposal, which codifies an abuse of discretion standard, may have a similar result.

*Id.* (footnotes omitted). See also Armour, *Rethinking*, *supra* note 513, at 557-58.

[T]he Cooter Court's adoption of the unitary abuse of discretion standard as the appellate standard for all aspects of the Rule 11 decision, accepts variability in outcomes, including competing sanction decisions, defines variability widely to include a limited right to be wrong, and then shifts the risk of conflicting outcomes in close cases to the sanctioned litigant. It is the sanctioned party who bears the risk of what the institution has decided is a "tolerable level of error."

*Id.* (footnotes omitted).

<sup>595</sup> See *supra* Part III.A.4.a.

<sup>596</sup> Friendly, *supra* note 392, at 764.

nearly so complete an immunity bath to the trial court's rulings as counsel for appellees would have reviewing courts believe. *An appellate court must carefully scrutinize the nature of the trial court's determination and decide whether that court's superior opportunities for observation or other reasons of policy require greater deference than would be accorded to its formulations of law or its application of law to the facts. In cases within the former categories, "abuse of discretion" should be given a broad reading, in others a reading which scarcely differs from the definition of error. Above all, an appellate court should consider whether the lawmaker intended that discretion should be committed solely to the trial judge or to judges throughout the judicial system.*<sup>597</sup>

In short, there are differing levels of appellate scrutiny under the abuse of discretion standard, depending on the district court's analysis.<sup>598</sup> It is therefore each federal appellate court's responsibility to conscientiously decide whether a "broad" or "narrow" formulation of the abuse of discretion standard is appropriate to deciding the Rule 11 issue (or case) before it. Clearly, in keeping with the high sanctioning thresholds being espoused here, "close cases," or cases involving novel or unsettled areas of law, should require applying the narrow formulation.

### C. High Sanctioning Thresholds and Value Judgments

Rule 11 is a deterrent device and, as such, it "suffers from the inevitable weakness of all deterrent devices," namely, that "it cannot be calibrated with precision. There is always some risk of overdeterrence just as there is a risk that the intended target may escape."<sup>599</sup> How any deterrent device will be interpreted and applied in practice will largely turn on value judgments. By adopting high sanctioning thresholds for

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<sup>597</sup> *Id.* at 783-84 (ellipsis in original) (emphasis added) (footnotes omitted).

<sup>598</sup> See also, Vairo, *Prologue*, *supra* note 83, at 72-78 (endorsing and elaborating on an approach to the abuse of discretion standard that recognizes the differing levels of scrutiny).

<sup>599</sup> *Developments in the Law*, *supra* note 20, at 1642 ("To the extent that Rule 11 deters frivolous litigation, it does so at the risk of chilling meritorious claims. This trade-off is not remarkable—chilling and deterrence are directly related. If Rule 11 were no deterrent, it would have no chilling effect."); Schwarzer, *supra* note 23, at 12.

Rule 11, it is clear that some people who may be the “intended targets” of Rule 11 sanctions will indeed escape without liability. This result is intentional, however, because high sanctioning thresholds, like the ones suggested here, intentionally privilege access to court over other values that may be served by the Rule, such as efficiency.<sup>600</sup>

Access to court is critical for litigants asserting non-mainstream claims that challenge the existing socio-political order. It is critical for two very related reasons: first, because minority groups are typically outside of the political decision making process and, as a result, subject to the will of the majority,<sup>601</sup> and, second, because of the integral part courts play in our constitutional system and democratic form of government.<sup>602</sup> More specifically, under a separation of powers ideal,<sup>603</sup>

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<sup>600</sup> As Professor Armour notes,

The regulatory line of Rule 11 that defines frivolous litigation and distinguishes it from merely meritless litigation, also limits disputants’ access to a powerful arm of the state and the legitimating function that power plays in resolving social conflicts. The power and authority of the judiciary to enforce Rule 11 does not simply refer to its power to regulate lawyers’ conduct and their potential for abusing that power by imposing undeservedly large fines. The judiciary’s power under Rule 11 includes defining what disputes may be brought into the judicial arena, and by implication, what disputes may not be brought without risk of public censure and sanction. When sanctions are issued under Rule 11, the Rule explicitly excludes the availability to . . . “others similarly situated.” These sanctions decisions will inevitably shape the courts of the future.

Armour, *Practice*, *supra* note 55, at 698-99 (footnotes omitted).

<sup>601</sup> See Yamamoto, *Efficiency’s Threat*, *supra* note 72, at 417.

<sup>602</sup> Justice Stevens once wrote that

Freedom of access to the courts is a cherished value in our democratic society . . . . There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant’s claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.

Talamani v. All-State Ins. Co., 470 U.S. 1067, 1070-71 (1985) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring).

<sup>603</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307-09 (1976).

Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories. In practice, all governmental officials, including



courts operate to prevent oppression of minorities by the majority;<sup>604</sup> they function, at least in part, to hold government accountable by constitutional standards;<sup>605</sup> and they are an important forum in which

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judges, have exercised a large and messy admixture of powers, and that is as it must be.

*Id.* See also Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUMAN BEHAVIOR 121, 125 (1982).

In my view, courts should not be viewed in isolation but as a coordinate source of governmental power. They should be viewed as an integral part of the larger political system . . . . In America, the legitimacy of the courts, and the power they exercise in structural reform or for that matter in any type of constitutional litigation, is founded on the unique competence of the judiciary to perform their distinctive social function, which is . . . to give concrete meaning and application to the public values embodied in the Constitution.

*Id.* See also Yamamoto, *Efficiency's Threat*, *supra* note 72, at 418.

Diminished minority participation in the process of negotiating public values strikes at the very heart of the structure of American society and its system of governance. One role of the judiciary is to provide a formal forum in which to address disputes about group interests and public values arising out of severe imbalances in power among social groups. Diminished minority access to judicial forums for negotiating public values threatens that separation of powers ideal.

*Id.*

<sup>604</sup> Indeed, according to Judge Stephen Reinhardt, "[t]he vindication of the rights of the poor and the powerless, those most in need of government protection, was perhaps the most important function that the federal courts served." Stephen Reinhardt, *Limiting Access to the Federal Courts: Round Up The Usual Victims*, 6 WHITTIER L. REV. 967, 968 (1984) (emphasis added); see also Yamamoto, *Efficiency's Threat*, *supra* note 72, at 399 ("The public law dimension to adjudication builds upon traditional political theory embracing a separation of powers ideal. That political theory is concerned with the potential for oppression of the powerless inherent in the pure form of majoritarian rule.") (footnote omitted).

As H.L.A. Hart wrote, "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individual liberty . . ." H.L.A. HART, LAW, LIBERTY AND MORALITY 79 (1963). The greatest danger, however, is "not that . . . the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so." *Id.* at 77-78.

<sup>605</sup> Yamamoto, *Efficiency's Threat*, *supra* note 72, at 399-400. Professor Yamamoto writes,

One function of the courts is to hold government's elective branches accountable to constitutional standards and protect "discrete and insular minorities" from intemperate majorities. Especially where the political will of the majority encourages restriction of minority liberties, an accessible judiciary furthers societal interest and, in particular, those of the minority, by providing a formal public forum for testing government conduct according to constitutional ideals. Rights assertion is the mechanism for triggering judicial scrutiny.

*public values*<sup>606</sup> and *group rights*<sup>607</sup> can be discussed, renegotiated,<sup>608</sup> and vindicated.<sup>609</sup> Access to courts “for minorities asserting rights,” is

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*Id.* (footnotes omitted).

<sup>606</sup> Fiss, *supra* note 603, at 124. According to Professor Fiss, [T]he Constitution that we know today . . . is a constitution that does far more than simply establish a form of government. It identifies a set of values such as equality, liberty, no cruel and unusual punishment, due process, security of the person, and freedom of speech. These values transcend the private ends implied by the [private] dispute resolution model and inform and limit the function of our government. They stand as the core of a public morality and serve as the substantive foundations of structural litigation. The social function of contemporary litigation is not to resolve disputes, but rather to give concrete meaning to that morality within the context of the bureaucratic state.

*Id.*

<sup>607</sup> Yamamoto, *Efficiency's Threat*, *supra* note 72, at 401. According to Professor Yamamoto, “[w]hether a government hiring scheme is discriminatory, a county’s electoral structure constitutes gerrymandering, or welfare benefits have been improperly terminated, all involve disputes about ‘rights’ both of the individual directly involved and the group indirectly affected.” *Id.*; see also Chayes, *supra* note 603, at 1291 (exemplifying the use of class actions as the “emergence of the group as the real subject or object of . . . litigation”). Professor Chayes writes that

The class suit is a reflection of our growing awareness that a host of important public and private interactions—perhaps the most important in defining the conditions and opportunities of life for most people—are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.

Chayes, *supra* note 603, at 1291.

<sup>608</sup> Yamamoto, *Efficiency's Threat*, *supra* note 72, at 412-13. Professor Yamamoto argues that

Many declared judicial principles disfavor the disadvantaged. Some that appear to be favorable are later weakened by judicial interpretation. Some principles are cast so broadly that they provide little meaningful guidance for day-to-day public behavior. Some legal arguments reinterpreting notions of appropriate social relations never prevail. Some rights claims, however, are rejected by courts as untenable, if not outlandish, until “developing lines of legal or social thought” make them acceptable. Central to the renegotiation process is the opportunity of those affected to participate meaningfully. One key to meaningful participation is an accessible judiciary.

*Id.* (footnotes omitted).

<sup>609</sup> This conception of civil rights litigation rejects the traditional model of adjudication, which “presupposes a dispute between private individuals of roughly equal bargaining power . . . who, through their zealous advocates, present an impartial decision maker with

therefore a “part of a dynamic process of cultural transformation,”<sup>610</sup> and Rule 11 should not be used to impede that process.<sup>611</sup>

## V. CONCLUSION

Rule 11 was amended in 1983 in an effort to provide federal district courts with a tool to curb frivolous litigation and, hence, to help control their dockets. In practice, however, the Rule produced severe chilling effects on plaintiffs asserting civil rights claims in the federal courts. Rule 11 was therefore amended again ten years later to reduce or

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all the relevant information necessary for that decision maker to deliver a ‘fair’ decision[.]” i.e., “one that attempts to return the private individuals to the status quo ante.” Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 GEORGE MASON U. CIV. RTS. L.J. 1, 109 (1998) (footnotes omitted). Rather,

[c]ourts are no longer used solely to establish and enforce private rights. Instead, they are being used by minority groups asserting rights claims as forums to develop and express their own narratives that counter the current understandings of existing rights, duties, and categories that classify events and relationships. These counter-narratives challenge existing power structures and systems of domination by challenging the entrenched and often unspoken assumptions and vantage points that create and perpetuate them. By offering a previously unaccepted framework, therefore, a counter-narrative “‘stretch[es] or chang[es] accepted frameworks for organizing reality[.]’” and, in so doing, it “undermines the clarity and strength of” current understandings, “infusing complexity and providing a competing perspective.”

*Id.* at 109-10 (footnotes and citations omitted).

<sup>610</sup> Yamamoto, *Efficiency's Threat*, *supra* note 72, at 349. I have written elsewhere that [civil] rights litigation: builds community; it shapes public discourse over the meaning(s) of, and significance to be attached to, rights, values, and the differences among us; it educates and informs the public thereby raising public awareness of non-mainstream perspectives; and it transmits a powerful political message “‘concerning ‘the kind of society we want to live in.’”

Hart, *supra* note 609, at 111-12 (footnotes omitted).

<sup>611</sup> Judge Johnson reminds us that

Whether for good or ill, the federal courts have become great engines of social change in this country. As long as the federal courts occupy this role, they must remain open to, and willing to hear from, those who advance good faith arguments to change existing law. The threat of imposition of large awards of attorneys’ fees, however, effectively closes the courts to such arguments. The impending danger of large monetary sanctions inexorably discourages practitioners from pressing positions which, while tenable, depart from the current state of the law.

Johnson, *supra* note 63, at 650.

alleviate, among other things, these effects. Unfortunately, the research conducted here suggests that, because of the way the 1993 amendments are being interpreted and applied in the federal courts, the chilling effects continue to exist today. The more particular result of this finding is that, in all likelihood, plaintiffs bringing civil rights claims are, and will continue to be, disproportionately affected by Rule 11.

Hopefully these preliminary findings will stimulate additional research and further discussion about the future of Rule 11. Until then, however, this Article strongly recommends that the federal courts adopt an approach to Rule 11 that employs high sanctioning thresholds. Only by recognizing that Rule 11 should be an exceptional remedy for use in exceptional circumstances will we protect access to courts for civil rights plaintiffs.

VI. APPENDICES

APPENDIX 1: FEDERAL APPELLATE CASES\*

SECOND CIRCUIT (7): *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52 (2d Cir. 2000); *Margo v. Weiss*, 213 F.3d 55 (2d Cir. 2000); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999); *L.B. Foster Co. v. America Piles, Inc.*, 138 F.3d 81 (2d Cir. 1998); *Sakon v. Andreo*, 119 F.3d 109 (2d Cir. 1997); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2d Cir. 1997); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320 (2d Cir. 1995).

THIRD CIRCUIT (2): *Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania*, 103 F.3d 294 (3d Cir. 1996); *Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988).

FIFTH CIRCUIT (6): *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 731 (5th Cir. 2001); *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000); *Goldin v. Bartholow*, 166 F.3d 710 (5th Cir. 1999); *Edwards v. General Motors Corp.*, 153 F.3d 242 (5th Cir. 1998); *Thornton v. General Motors Corp.*, 136 F.3d 450 (5th Cir. 1998); *Elliott v. Tilton*, 64 F.3d 213 (5th Cir. 1995).

SIXTH CIRCUIT (11): *Heldt v. Nicholson*, No. 00-1495, 2001 WL 111648 (6th Cir. Jan. 31, 2001); *Hayden v. Sass*, No. 99-1243, 2000 WL 1140516 (6th Cir. Aug. 2, 2000); *Singh v. Capital University Law & Graduate Center*, No. 99-3564, 2000 WL 302778 (6th Cir. Mar. 17, 2000); *Powell v. Squire, Sanders & Dempsey*, Nos. 98-3668, 98-3670, 1999 WL 519186 (6th Cir. July 16, 1999); *Cobleigh v. United States*, No. 97-2302, 1999 WL 195738 (6th Cir. Mar. 23, 1999); *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998); *Bernstein v. Remer*, No. 96-2232, 1997 WL 685369 (6th Cir. Oct. 29, 1997); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374 (6th Cir. 1997); *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997); *Ortman v. Thomas*, 99 F.3d 807 (6th Cir. 1996); *Wesely v. Churchill Development Corp.*, No. 95-4024, 1996 WL 616636 (6th Cir. Oct. 24, 1996).

SEVENTH CIRCUIT (6): *Vollmer v. Publishers Clearing House*, 248 F.3d 698 (7th Cir. 2001); *Independent Lift Truck Builders Union v. NACCO Materials Handling Group, Inc.*, 202 F.3d 965 (7th Cir. 2000);

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\* None of the cases cited here has been reversed. All subsequent history has been omitted.

*Divane v. Krull Electric Co.*, 200 F.3d 1020 (7th Cir. 1999); *Harter v. Iowa Grain Co.*, Nos. 96-3907, 97-2671, 96-4074, 97-2041, 1999 WL 754333 (7th Cir. July 15, 1998); *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041 (7th Cir. 1998); *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147 (7th Cir. 1996).

NINTH CIRCUIT (11): *Habib v. Cruz*, No. 00-17103, 2001 WL 985637 (9th Cir. Aug. 28, 2001); *Enercon, GMBH v. Erdman*, No. 00-15399, 2001 WL 777476 (9th Cir. July 11, 2001); *Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772 (9th Cir. 2001); *Van Scoy v. Shell Oil Co.*, No. 00-15087, 2001 WL 338071 (9th Cir. Apr. 5, 2001); *United National Insurance Co. v. R & D Latex Corp.*, 242 F.3d 1102 (9th Cir. 2001); *Hugo Neu-Proler Co. v. Local 13 International Longshoreman & Warehouse Union*, No. 99-55322, 2000 WL 1459766 (9th Cir. Sept. 28, 2000); *Hutchinson v. Hensley Flying Service, Inc.*, No. 98-35361, 2000 WL 11432 (9th Cir. Jan. 6, 2000); *Flanagan v. Arnaiz*, No. 97-15517, 1999 WL 1128641 (9th Cir. Dec. 7, 1999); *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998); *Madamba v. Certified Grocers California, Ltd.*, No. 9715017, 1998 WL 339685 (9th Cir. May 7, 1998); *Warren v. Guelker*, 29 F.3d 1386 (9th Cir. 1994).

APPENDIX 2: FEDERAL DISTRICT COURT CASES\*

SECOND CIRCUIT (36): *Camprubi-Soms v. Aranda*, No. 00 Civ. 9626 (DLC), 2002 WL 10439 (S.D.N.Y. Jan. 3, 2002); *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (JSH), 2001 WL 1154669 (S.D.N.Y. Oct. 1, 2001); *Garone v. United Parcel Service, Inc.*, No. 00-CV-6722 (ILS), 2001 WL 984914 (E.D.N.Y. July 12, 2001); *Kron v. Moravia Central School District*, No. 5:98-CV-1876 (FJS/GJD), 2001 WL 536274 (N.D.N.Y. May 3, 2001); *R.B. Ventures, Ltd. v. Shane*, No. 91 Civ. 567 (CSH), 2000 WL 1010400 (S.D.N.Y. July 20, 2000); *Fowler v. Transit Supervisors Organization*, No. 96 Civ. 6796 (JGK), 2000 WL 303283 (S.D.N.Y. Mar. 23, 2000); *Williams v. Perry*, No. 3:99-CV-00725EBB, 2000 WL 341259 (D. Conn. Feb. 23, 2000); *Gamla Enterprises North America, Inc. v. Lunor-Brillen Design U. Vertriebs GMBH*, No. 98 Civ. 992 (MGC), 2000 WL 193120 (S.D.N.Y. Feb. 17, 2000); *Ping He (Hai Nam) Co. v. Nonferrous Metals (U.S.A.), Inc.*, 22 F. Supp. 2d 94 (S.D.N.Y. 1998); *Brady v. Marks*, 7 F. Supp. 2d 247 (W.D.N.Y. 1998); *Blanco v. Remington Hotel Corp.*, No. 96 Civ. 6306 (WK) JCF, 1998 WL 66009 (S.D.N.Y. Feb. 17, 1998); *Galonsky v. Williams*, No. 96 Civ. 6207 (JSM), 1997 WL 759445 (S.D.N.Y. Dec. 10, 1997); *Tornheim v. Federal Home Loan Mortgage Corp.*, 988 F. Supp. 279 (S.D.N.Y. 1997); *Honeywell, Inc. v. Firequench, Inc.*, No. 96 Civ. 694 (DLC), 1997 WL 570514 (S.D.N.Y. Sept. 12, 1997); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997); *Lopez v. Constantine*, Nos. 94 Civ. 5921 (DAB)(SEG), 95 Civ. 5915 (DAB)(SEG), 1997 WL 337510 (S.D.N.Y. June 18, 1997); *Banfield v. UHS Home Attendants, Inc.*, No. 96 Civ. 4850 (JFK), 1997 WL 342422 (S.D.N.Y. June 23, 1997); *Revson v. Brod*, No. 96 Civ. 5608 8HS RLE, 1997 WL 317369 (S.D.N.Y. June 12, 1997); *Weeks Stevedoring Co. v. Raymond International*, 174 F.R.D. 301 (S.D.N.Y. 1997); *Weiss v. Weiss*, 984 F. Supp. 682 (S.D.N.Y. 1997); *Succession Picasso v. Spedding*, No. 96 Civ. 4546 (SAS), 1997 WL 65911 (S.D.N.Y. Feb. 13, 1997); *Kahre-Richardes Family Foundation, Inc. v. Village of Baldwinsville*, 953 F. Supp. 39 (N.D.N.Y. 1997); *Bonondona v. Stat House, Inc.*, No. 94 Civ. 0788 (JEG)(LB), 1997 WL 43614 (S.D.N.Y. Feb. 4, 1997); *Lancaster v. Zufle*, 170 F.R.D. 7 (S.D.N.Y. 1996); *Chauvet v. Local 1199 Drug, Hospital, & Health Care Employees Union*, Nos. 96 Civ. 2934 (SS), 96 Civ. 4622 (SS), 1996 WL

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\* None of the cases cited here has been reversed on appeal. Some of the cases may have been modified. My purpose in collecting and citing these cases, however, was to see what Rule 11 practice was like in the federal district courts. Consequently, all subsequent history has been omitted.

665610 (S.D.N.Y. Nov. 18, 1996); *Wright v. Wilson Elser Moskowitz Edelman & Dicker*, No. 95 CIV 7970 (MGC), 1996 WL 447773 (S.D.N.Y. Aug. 8, 1996); *Sears, Roebuck & Co. v. Sears Realty Co.*, 932 F. Supp. 392 (N.D.N.Y. 1996); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121 (N.D.N.Y. 1996); *Provident Mutual Life Insurance Co. of Philadelphia v. Vergara*, No. 91 Civ. 5657 KID RLE, 1995 WL 746379 (S.D.N.Y. Dec. 15, 1995); *Chi v. Age Group, Ltd.*, No. 94 CIV 5253 (AGS), 1995 WL 564159 (S.D.N.Y. Sept. 22, 1995); *Bowler v. United States Immigration and Naturalization Service*, 901 F. Supp. 597 (S.D.N.Y. 1995); *O'Brien v. Alexander*, 898 F. Supp. 162 (S.D.N.Y. 1995); *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449 (E.D.N.Y. 1995); *Gray v. Millea*, 892 F. Supp. 432 (N.D.N.Y. 1995); *Anyanwu v. Columbia Broadcasting System*, 887 F. Supp. 690 (S.D.N.Y. 1995); *D'Orange v. Feely*, 877 F. Supp. 152 (S.D.N.Y. 1995).

THIRD CIRCUIT (13): *Brunner v. AlliedSignal, Inc.*, 198 F.R.D. 612 (D.N.J. 2001); *Clement v. Public Service Electric & Gas Co.*, 122 F. Supp. 2d 551 (D.N.J. 2000); *In re Prudential Insurance Co. of America Sales Practices Litigation*, 63 F. Supp. 2d 516 (D.N.J. 1999); *Farris v. County of Camden*, 61 F. Supp. 2d 307 (D.N.J. 1999); *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147 (D.N.J. 1999); *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121 (D.N.J. 1998); *Hockley v. Shan Enterprises Ltd. Partnership*, 19 F. Supp. 2d 235 (D.N.J. 1998); *Lopez v. Constantine*, Nos. 94 CIV. 5921 DAB SEG, 95 CIV. 5915 DAB SEG, 1997 WL 793595 (E.D. Pa. Dec. 23, 1997); *Kleinpaste v. United States Internal Revenue Service*, No. 97-884, 1997 U.S. Dist. LEXIS 22377 (W.D. Pa. Dec. 19, 1997); *Lal v. Borough of Kennett Square*, 935 F. Supp. 570 (E.D. Pa. 1996); *Progress Federal Savings Bank v. Lenders Ass'n*, No. CIV. A. 94-7425, 1996 WL 57942 (E.D. Pa. Feb. 12, 1996); *Watson v. City of Salem*, 934 F. Supp. 643 (D.N.J. 1995); *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994).

FIFTH CIRCUIT (10): *Porter v. Milliken & Michael, Inc.*, No. 99-0199, 2001 WL 104769 (E.D. La. Sept. 7, 2001); *Seal v. Gateway Cos. of Delaware*, No. 01-1322, 2001 WL 1018362 (E.D. La. Sept. 4, 2001); *Laughlin v. Falcon Operators, Inc.*, No. Civ. A. 00-1484, 2001 WL 474282 (E.D. La. May 3, 2001); *Muhammad v. State of Louisiana*, Nos. CIV. A. 99-3472, Civ. A. 99-2694, 2000 WL 1876350 (E.D. La. Dec. 21, 2000); *Riley v. City of Jackson, Mississippi*, 2 F. Supp. 2d 864 (S.D. Miss. 1997); *Hicks v. Bexar County, Texas*, 973 F. Supp. 653 (W.D. Tex. 1997); *Columbia Gulf Transmission Co. v. United States*, 966 F. Supp. 1453 (S.D. Miss. 1997); *Tolbert v. Dallas Area Rapid Transit*, No. CA3-96-CV-0428-R, 1997



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WL 135606 (N.D. Tex. Mar. 18, 1997); *Prewitt v. Alexander*, 173 F.R.D. 438 (N.D. Miss. 1996); *Toups v. Archer-Daniels-Midland Co.*, 155 F.R.D. 588 (S.D. Tex. 1994).

SIXTH CIRCUIT (7): *Miller v. Credit Collection Services*, 200 F.R.D. 379 (S.D. Ohio 2000); *Simmons v. Daimler-Chrysler Corp.*, No. 99-CV-76093-DT, 2000 WL 424198 (E.D. Mich. Mar. 13, 2000); *Neighbors Concerned About Yacht Club Expansion v. Grosse Pointe Yacht Club*, No. 99-70325, 1999 U.S. Dist. LEXIS 8646 (E.D. Mich. May 26, 1999); *Allied Mechanical Services, Inc. v. Local 337 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry*, No. 4:98-CV-113, 1999 U.S. Dist. LEXIS 4654 (W.D. Mich. Mar. 30, 1999); *Miller v. United States*, No. 5:06-CV-1237, 1998 WL 372340 (N.D. Ohio Feb. 6, 1998); *Two Men & a Truck/International Inc. v. Two Men & a Truck/Kalamazoo, Inc.*, No. 5:94-CV-162, 1996 WL 740540 (W.D. Mich. Oct. 16, 1996); *Kratage v. Charter Township of Commerce*, 926 F. Supp. 102 (E.D. Mich. 1996).

SEVENTH CIRCUIT (18): *Hartford Casualty Insurance Co. v. Theobold*, No. IP00-0325-C-M/S, 2001 WL 484181 (S.D. Ind. Jan. 16, 2001); *Bryant v. Polston*, No. IP00-1064-C-T/G, 2000 WL 1670938 (S.D. Ind. Nov. 2, 2000); *Klefstad Companies, Inc. v. New Boston Allison Ltd. Partnership*, No. IP98-0771-C-T/G, 2000 WL 1469701 (S.D. Ind. Sept. 29, 2000); *Cox v. Preferred Technical Group, Inc.*, 110 F. Supp. 2d 786 (N.D. Ind. 2000); *Northlake Marketing & Supply, Inc. v. Glaverbel, S.A.*, 194 F.R.D. 633 (N.D. Ill. 2000); *Smith v. Prudential Insurance Co. of America*, No. 98 C 5903, 2000 WL 549483 (N.D. Ill. May 1, 2000); *Dearborn Financial Services Corp. v. Heath*, No. 98 CV 5222, 1999 WL 1011860 (N.D. Ill., Sept. 30, 1999); *Harding University v. Consulting Services Group, L.P.*, 48 F. Supp. 2d 765 (N.D. Ill. 1999); *Birch v. Kim*, 977 F. Supp. 926 (S.D. Ind. 1997); *Cooper v. Chicago Transit Authority*, No. 95 C 2616, 1997 U.S. Dist. LEXIS 5299 (N.D. Ill. Apr. 14, 1997); *Vildaver v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 94 C 3042, 94 C 3143, 1997 WL 7562 (N.D. Ill. Jan. 2, 1997); *Smith v. CB Commercial Real Estate Group, Inc.*, 947 F. Supp. 1282 (S.D. Ind. 1996); *Lerch v. Boyer*, 929 F. Supp. 319 (N.D. Ind. 1996); *Erg v. Stern*, No. 94C3729, 1996 WL 131743 (N.D. Ill. Mar. 11, 1996); *Sethness-Greenleaf, Inc. v. Green River Corp.*, Nos. 89C9203, 91C4373, 1995 U.S. Dist LEXIS 13796 (N.D. Ill. Sept. 20, 1995); *Religious Order of St. Matthew v. Brennan*, No. 3:92-CV-79SRM, 1995 WL 555102 (N.D. Ind. June 8, 1995); *Gazouski v. Belvidere*, No. 93C20157, 1995 WL 149438 (N.D. Ill. Apr. 3, 1995); *Israel Travel Advisory Service, Inc. v.*

Israel Identity Tours, Inc., No. 92C2379, 1994 U.S. Dist. LEXIS 751 (N.D. Ill. Jan. 26, 1994).

NINTH CIRCUIT (8): Truesdell v. Southern California Permanente Medical Group, 151 F. Supp. 2d 1174 (C.D. Ca. 2001); Kibbee v. City of Portland, No. CV-980675-ST, 2000 U.S. Dist. LEXIS 17205 (D. Or. Oct. 12, 2000); McMahon v. Best, No. C-00-00616 CRB, 2000 U.S. Dist. LEXIS 10872 (N.D. Cal. July 28, 2000); *Ex rel.* Eitel v. Reagan, 35 F. Supp. 2d 1151 (D. Ariz. 1998); Fat T, Inc. v. Aloha Tower Associates Piers 7, 8, 9, 172 F.R.D. 411 (D. Haw. 1996); Curl v. Wilson, No. C93-2376FMS, 1994 WL 323998 (N.D. Cal. June 23, 1994); Religious Technology Center v. Gerbode, No. 93-2226AWT, 1994 WL 228607 (C.D. Cal. May 2, 1994); Dunn v. Pepsi-Cola Metropolitan Bottling Co., 850 F. Supp. 853 (N.D. Cal. 1994).

APPENDIX 3: RULE 11 MOTIONS–DISTRICT COURT CASES\*

SECOND CIRCUIT (42): *Camprubi-Soms v. Aranda*, No. 00 Civ. 9626 (DLC), 2002 WL 10439 (S.D.N.Y. Jan. 3, 2002) (cross motions); *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (JSH), 2001 WL 1154669 (S.D.N.Y. Oct. 1, 2001); *Garone v. United Parcel Service, Inc.*, No. 00-CV-6722 (ILJ), 2001 WL 984914 (E.D.N.Y. July 12, 2001); *Kron v. Moravia Central School District*, No. 5:98-CV-1876 (FJS/GJD), 2001 WL 536274 (N.D.N.Y. May 3, 2001); *R.B. Ventures, Ltd. v. Shane*, No. 91 Civ. 5678 (CSH), 2000 WL 1010400 (S.D.N.Y. July 20, 2000); *Fowler v. Transit Supervisors Organization*, No. 96 Civ. 6796 (JGK), 2000 WL 303283 (S.D.N.Y. Mar. 23, 2000); *Williams v. Perry*, No. 3:99-CV-00725EBB, 2000 WL 341259 (D. Conn. Feb. 23, 2000); *Gamla Enterprises North America, Inc. v. Lunor-Brillen Design U. Vertriebs GMBH*, No. 98 Civ. 992 (MGC), 2000 WL 193120 (S.D.N.Y. Feb. 17, 2000); *Ping He (Hai Nam) Co. v. Nonferrous Metals (U.S.A.), Inc.*, 187 F.R.D. 121 (S.D.N.Y. 1999); *Brady v. Marks*, 7 F. Supp. 2d 247 (W.D.N.Y. 1998); *Blanco v. Remington Hotel Corp.*, No. 96 Civ. 6306 (WK) JCF, 1998 WL 66009 (S.D.N.Y. Feb. 17, 1998) (cross motions); *Galonsky v. Williams*, No. 96 Civ. 6207 (JSM), 1997 WL 759445 (S.D.N.Y. Dec. 10, 1997); *Tornheim v. Federal Home Loan Mortgage Corp.*, 988 F. Supp. 279 (S.D.N.Y. 1997); *Honeywell, Inc. v. Firequench, Inc.*, No. Civ. 694 (DLC), 1997 WL 570514 (S.D.N.Y. Sept. 12, 1997); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997); *Banfield v. UHS Home Attendants, Inc.*, No. 96 Civ. 4850 (JFK), 1997 WL 342422 (S.D.N.Y. June 23, 1997); *Lopez v. Constantine*, Nos. 94 Civ. 5921 (DAB)(SEG), 95 Civ. 5915 (DAB)(SEG), 1997 WL 337510 (S.D.N.Y. June 18, 1997); *Revson v. Brod*, No. 96 Civ. 5608 SHS RLE, 1997 WL 317369 (S.D.N.Y. June 12, 1997); *Weeks Stevedoring Co. v. Raymond International*, 174 F.R.D. 301 (S.D.N.Y. 1997) (cross motions); *Weiss v. Weiss*, 984 F. Supp. 682 (S.D.N.Y. 1997); *Succession Picasso v. Spedding*, No. 96 CV 4546 (SAS), 1997 WL 65911 (S.D.N.Y. Feb. 13, 1997), *aff'd on reargument*, 1997 WL 107462 (S.D.N.Y. Mar. 10, 1997); *Bonondona v. Stat House, Inc.*, No. 94 Civ. 0788 (JES)(LB), 1997 WL 43614 (S.D.N.Y. Feb. 4, 1997) (cross motions); *Kahre-Richard's Family Foundation, Inc. v. Village of Baldwinsville*, 953 F. Supp. 39 (N.D.N.Y. 1997); *Lancaster v. Zufle*, 170 F.R.D. 7 (S.D.N.Y. 1996); *Chauvet v. Local 1199 Drug, Hospital, & Health Care Employees Union*, Nos. 96 Civ. 2934 (SS), 96

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\* Some cases involved cross-motions for Rule 11 sanctions filed by both plaintiff and defendant. In those situations, two motions were counted in the total of ninety-seven reached here.

Civ. 4622 (SS), 1996 WL 665610 (S.D.N.Y. Nov. 18, 1996); *Wright v. Wilson Elser Moskowitz Edelman & Dicker*, No. 95 CIV 7970 (MGC), 1996 WL 447773 (S.D.N.Y. Aug. 8, 1996); *Sears, Roebuck & Co. v. Sears Realty Co.*, 932 F. Supp. 392 (N.D.N.Y. 1996); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121 (N.D.N.Y. 1996); *Provident Mutual Life Insurance Co. v. Vergara*, No. 91 Civ. 5657 KTD, RLE, 1995 WL 746379 (S.D.N.Y. Dec. 15, 1995); *Chi v. Age Group, Ltd.*, No. 94 CIV 4253 (AGS), 1995 WL 564159 (S.D.N.Y. Sept. 22, 1995); *Bowler v. United States Immigration and Naturalization Service*, 901 F. Supp. 597 (S.D.N.Y. 1995); *O'Brien v. Alexander*, 898 F. Supp. 162 (S.D.N.Y. 1995) (cross motions); *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449 (E.D.N.Y. 1995) (cross motions); *Gray v. Millea*, 892 F. Supp. 432 (N.D.N.Y. 1995); *Anyanwu v. Columbia Broadcasting System*, 887 F. Supp. 690 (S.D.N.Y. 1995); *D'Orange v. Feely*, 877 F. Supp. 152 (S.D.N.Y. 1995).

THIRD CIRCUIT (12): *Brunner v. AlliedSignal, Inc.*, 198 F.R.D. 612 (D.N.J. 2001); *Clement v. Public Service Electric & Gas Co.*, 122 F. Supp. 2d 551 (D.N.J. 2000); *In re Prudential Insurance Co. of America Sales Practices Litigation*, 63 F. Supp. 2d 516 (D.N.J. 1999); *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147 (D.N.J. 1999) (cross motions); *Hockley v. Shan Enterprises Ltd. Partnership*, 19 F. Supp. 2d 235 (D.N.J. 1998); *Kleinpaste v. United States Internal Revenue Service*, No. 970884, 1997 U.S. Dist. LEXIS 22377 (W.D. Pa. Dec. 19, 1997); *Lopez v. Constantine*, Nos. 94 CIV 5981 DAB SEG, 95 CIV 5915 DAB SEG, 1997 WL 793595 (E.D. Pa. June 18, 1997); *Lal v. Borough of Kennett Square*, 935 F. Supp. 570 (E.D. Pa. 1996); *Progress Federal Savings Bank v. Lenders Ass'n*, No. CIV A 94-7425, 1996 WL 57942 (E.D. Pa. Feb. 12, 1996); *Watson v. City of Salem*, 934 F. Supp. 643 (D.N.J. 1995); *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994).

FIFTH CIRCUIT (9): *Porter v. Milliken & Michael, Inc.*, No. 99-0199, 2001 WL 104769 (E.D. La. Sept. 7, 2001); *Seal v. Gateway Cos. of Delaware*, No. 01-1322, 2001 WL 1018362 (E.D. La. Sept. 4, 2001); *Laughlin v. Falcon Operators, Inc.*, No. Civ. A. 00-1484, 2001 WL 474282 (E.D. La. May 3, 2001); *Muhammad v. Louisiana*, Nos. CIV A. 99-3742, CIV A. 99-2694, 2000 U.S. Dist. LEXIS 18807 (E.D. La. Dec. 21, 2000); *Riley v. City of Jackson, Mississippi*, 2 F. Supp. 2d 864 (S.D. Miss. 1997); *Columbia Gulf Transmission Co. v. United States*, 966 F. Supp. 1453 (S.D. Miss. 1997) (cross motions); *Tolbert v. Dallas Area Rapid Transit*, No.

GA3-96-CV-0428-R, 1997 WL 135606 (N.D. Tex. Mar. 18, 1997); *Prewitt v. Alexander*, 173 F.R.D. 438 (N.D. Miss. 1996).

SIXTH CIRCUIT (7): *Miller v. Credit Collection Services*, 200 F.R.D. 379 (S.D. Ohio 2000) (cross motions); *Simmons v. Daimler-Chrysler Corp.*, No. 99-CV-76093-DT, 2000 WL 424198 (E.D. Mich. Mar. 13, 2000); *Neighbors Concerned About Yacht Club Expansion v. Grosse Pointe Yacht Club*, No. 99-70325, 1999 U.S. Dist. LEXIS 8646 (E.D. Mich. May 26, 1999); *Allied Mechanical Services, Inc. v. Local 337 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry*, No. 4:98-CV-113, 1999 U.S. Dist. LEXIS 4654 (W.D. Mich. Mar. 30, 1999); *Two Men & a Truck/International Inc. v. Two Men & a Truck/Kalamazoo, Inc.*, No. 5-94-CV-62, 1996 WL 740540 (W.D. Mich. Oct. 16, 1996); *Kratage v. Charter Township of Commerce*, 926 F. Supp. 102 (E.D. Mich. 1996).

SEVENTH CIRCUIT (19): *Hartford Casualty Insurance Co. v. Theobold*, No. IP00-03250C-M/S, 2001 WL 484181 (S.D. Ind. Jan. 16, 2001); *Bryant v. Polston*, No. IP00-1064-C-T/G, 2000 WL 1670938 (S.D. Ind. Nov. 2, 2000) (cross motions); *Klefsstad Companies, Inc. v. New Boston Allison Ltd. Partnership*, No. IP98-0771-C-T/G, 2000 WL 1469701 (S.D. Ind. Sept. 29, 2000); *Cox v. Preferred Technical Group, Inc.*, 110 F. Supp. 2d 786 (N.D. Ind. 2000); *Northlake Marketing & Supply, Inc. v. Glaverbel, S.A.*, 194 F.R.D. 633 (N.D. Ill. 2000); *Smith v. Prudential Insurance Co. of America*, No. 95 C 5903, 2000 WL 549483 (N.D. Ill. May 1, 2000); *Dearborn Financial Services Corp. v. Heath*, No. 98CV5222, 1999 WL 1011860 (N.D. Ill. Sept. 30, 1999); *Harding University v. Consulting Services Group, L.P.*, 48 F. Supp. 2d 765 (N.D. Ill. 1999); *Birch v. Kim*, 977 F. Supp. 926 (S.D. Ind. 1997); *Cooper v. Chicago Transit Authority*, No. 95 C 2616, 1997 U.S. Dist. LEXIS 5299 (N.D. Ill. Apr. 14, 1997); *Vildaver v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 94 C 3041, 94 C 3143, 1997 WL 7562 (N.D. Ill. Jan. 2, 1997); *Smith v. CB Commercial Real Estate Group, Inc.*, 947 F. Supp. 1282 (S.D. Ind. 1996); *Lerch v. Boyer*, 929 F. Supp. 319 (N.D. Ind. 1996); *Erg v. Stern*, No. 94 C 3729, 1996 WL 131743 (N.D. Ill. Mar. 11, 1996); *Sethness-Greenleaf, Inc. v. Green River Corp.*, Nos. 89 C 9203, 91 C 4313, 1995 U.S. Dist. LEXIS 13796 (N.D. Ill. Sept. 20, 1995); *Religious Order of St. Matthew v. Brennan*, No. 3:92-CV-793 RM, 1995 WL 555102 (N.D. Ind. June 8, 1995); *Gazowski v. Belvidere*, No. 93 C 20157, 1995 WL 149438 (N.D. Ill. Apr. 3, 1995); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, No. 92 C 2379, 1994 U.S. Dist. LEXIS 751 (N.D. Ill. Jan. 26, 1994).

NINTH CIRCUIT (8): Truesdell v. Southern California Permanente Medical Group, 151 F. Supp. 2d 1174 (C.D. Cal. 2001); Kibbee v. City of Portland, No. CV-98-615-ST, 2000 U.S. Dist. LEXIS 17205 (D. Or. Oct. 12, 2000); McMahon v. Best, No. C-00-00616 CRB, 2000 U.S. Dist. LEXIS 10872 (N.D. Cal. July 28, 2000); *Ex rel* Eitel v. Reagan, 35 F. Supp. 2d 1151 (D. Ariz. 1998); Fat T, Inc. v. Aloha Tower Associates Piers 7, 8, 9, 172 F.R.D. 411 (D. Haw. 1996); Curl v. Wilson, No. C9302376 FMS, 1994 WL 323998 (N.D. Cal. June 23, 1994); Religious Technology Center v. Gerbode, No. 93-2226 AWT, 1994 WL 228607 (C.D. Cal. May 2, 1994); Dunn v. Pepsi-Cola Metropolitan Bottling Co., 850 F. Supp. 853 (N.D. Cal. 1994).

APPENDIX 4: REDUCTION IN RULE 11 ACTIVITY-DISTRICT COURT CASES

A total of four searches were conducted, one for the Central District of California and one for the Northern District of California, for each of the five-year time periods. The following natural language searches in the California Federal District Courts database on LEXIS were used: "Rule 11" "Fed. R. Civ. P. 11" "Federal Rule of Civil Procedure 11"; a field restriction for the northern district or the central district was selected for each search. All of the cites were then reviewed by my research assistant, Kristin M. Schuh, to make sure that the cases cited below did in fact deal with the applicable version of Rule 11. Subsequent history was not checked for any of the cases cited because the purpose of collecting this data was simply to test a hypothesis—has Rule 11 use declined in these two federal district courts since the 1993 amendments to the Rule? In short, I was merely interested in raw numbers. Whether any of the cases cited were ultimately modified or even reversed on appeal, therefore, had no bearing on the hypothesis being tested.

*1983 Version: January 1, 1986–December 31, 1991*

CENTRAL DISTRICT (23): *Zogbi v. Federated Department Store*, 767 F. Supp. 1037 (C.D. Cal. 1991); *Yagman v. Republic Insurance*, 137 F.R.D. 310 (C.D. Cal. 1991); *Refac International, Ltd. v. Hitachi, Ltd.*, 141 F.R.D. 281 (C.D. Cal. 1991); *Preferred Communications, Inc. v. City of Los Angeles*, No. CV 83-5846 (CBM)(Bx), 1991 U.S. Dist. LEXIS 19578 (C.D. Cal. Mar. 26, 1991); *In re All Terrain Vehicle Litigation*, 771 F. Supp. 1057 (C.D. Cal. 1991); *Sayatovic v. United States*, No. SA CV 90-641 AHS, 1990 U.S. Dist. LEXIS 15576 (C.D. Cal. Oct. 31, 1990); *Grantham v. United States*, No. SA CV89-755 AHS, 1990 U.S. Dist. LEXIS 11568 (C.D. Cal. Apr. 20, 1990); *Bloom v. Universal City Studios, Inc.*, 734 F. Supp. 1553 (C.D. Cal. 1990); *Dentsply Research & Development Corp. v. Cadco Dental Products, Inc.*, 14 U.S.P.Q. 2d 1039 (C.D. Cal. 1989); *Griffith v. Martech International, Inc.*, 754 F. Supp. 166 (C.D. Cal. 1989); *DNIC Brokerage Co. v. Morrison & Dempsey Communications, Inc.*, 14 U.S.P.Q. 2d 1043 (C.D. Cal. 1989); *Lentz v. Woolley*, No. 89-0805 JGD, 1989 U.S. Dist. LEXIS 12651 (C.D. Cal. June 12, 1989); *Pasillas v. McDonald's Corp.*, 11 U.S.P.Q. 2d 1880 (C.D. Cal. 1989); *Altmanshofer v. TRW, Inc.*, 95 B.R. 729 (C.D. Cal. 1988); *National Yellow Pages Services Ass'n v. O'Connor Agency, Inc.*, 9 U.S.P.Q. 2d 1516 (C.D. Cal. 1988); *Greene v. Meeder*, No. CV87-2621 CBM (Kx), 1987 U.S. Dist. LEXIS 14958 (C.D. Cal. Aug. 31, 1987); *Harper House, Inc. v. Thomas Nelson, Inc.*, No.

CV85-4225-PAR, 1987 U.S. Dist. LEXIS 14132 (C.D. Cal. Aug. 28, 1987); *Mercury Service, Inc. v. Allied Bank of Texas*, 117 F.R.D. 147 (C.D. Cal. 1987); *Clayton v. Pepsi Cola Bottling Group*, No. CV85-5957-WMB, 1987 U.S. Dist. LEXIS 13497 (C.D. Cal. Mar. 4, 1987); *Misa Manufacturing, Inc. v. Pacific Egg & Poultry Association*, No. CV 86-1495 AHS, 1987 U.S. Dist. LEXIS 14471 (C.D. Cal. Jan. 8, 1987); *S.O.S. Inc. v. Payday, Inc.*, 1 U.S.P.Q. 2d 1573 (C.D. Cal. 1986); *Continental Air Lines, Inc. v. Group Systems International Far East, Ltd.*, 109 F.R.D. 594 (C.D. Cal. 1986).

NORTHERN DISTRICT (52): *Anderson v. California Republican Party*, No. C-91-2091 MHP, 1991 U.S. Dist. LEXIS 18246 (N.D. Cal. Nov. 26, 1991); *Premier Commercial Corp., Ltd. v. FMC Corp.*, 139 F.R.D. 670 (N.D. Cal. 1991); *Bridgestone/Firestone, Inc. v. Oracle Corp.*, No. C-91-1420-DLJ, 1991 U. S. Dist. LEXIS 20180 (N.D. Cal. Nov. 18, 1991); *Integral Systems, Inc. v. Peoplesoft, Inc.*, No. C-90-2598-DLJ, 1991 U.S. Dist. LEXIS 20878 (N.D. Cal. July 19, 1991); *Blood v. Pan American World Airways, Inc.*, Nos. C 89-1442 RFP, C 89-02906 RFP, 1991 U.S. Dist. LEXIS 9905 (N.D. Cal. July 15, 1991); *In re Hayes Microcomputer Products, Inc. Patent Litigation*, 766 F. Supp. 818 (N.D. Cal. 1991); *Wolfe v. Langford*, No. C-90-3500-DLJ, 1991 U.S. Dist. LEXIS 5581 (N.D. Cal. Apr. 19, 1991); *Taylor v. Logic Devices, Inc.*, No. 89-20781, 1991 U.S. Dist. LEXIS 2574 (N.D. Cal. Feb. 27, 1991); *Louisville v. Armored Transportation of California*, No. C-90-0266 RFP, 1991 U.S. Dist. LEXIS 2523 (N.D. Cal. Feb. 26, 1991); *Basel v. Allstate Insurance Co.*, 757 F. Supp. 39 (N.D. Cal. 1991); *Stuckey v. Bar Ass'n*, Nos. C-90-2409 FMS, C-90-2486 FMS, 1991 U.S. Dist. LEXIS 1004 (N.D. Cal. Jan. 16, 1991); *Luxor California Exports Corp. v. RTM Navigation, Inc.*, No. C-88-2796 JPV (FJW), 1990 U.S. Dist. LEXIS 13676 (N.D. Cal. Sept. 27, 1990); *United States v. City and County of San Francisco*, 132 F.R.D. 533 (N.D. Cal. 1990); *Carter v. United States*, 66 A.F.T.R. 2d 5597 (N.D. Cal. 1990); *Black's Guide, Inc. v. Mediaamerica, Inc.*, 16 U.S.P.Q. 2d 1769 (N.D. Cal. 1990); *Geurin v. Department of the Army*, No. C-89-3980 MHP, 1990 U.S. Dist. LEXIS 7748 (N.D. Cal. May 16, 1990); *Marine Terminals Corp. v. St. Paul Fire & Marine Insurance Co.*, No. C 89-4557 MHP, 1990 U.S. Dist. LEXIS 7856 (N.D. Cal. Apr. 25, 1990); *Heinz v. Operating Engineers Health & Welfare Trust Fund*, No. C-88-2472-DLJ, 1990 U.S. Dist. LEXIS 7779 (N.D. Cal. Apr. 20, 1990); *In re Orosco v. Orosco*, No. C-89-2875 MHP, 1990 U.S. Dist. LEXIS 19288 (N.D. Cal. Apr. 20, 1990); *Xerox Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542 (N.D. Cal. 1990); *American States Insurance Co. v. Pinto*, No. C 892469 SC, 1990 U.S. Dist. LEXIS 7778 (N.D. Cal. Apr. 5, 1990); *Cenlin Taiwan Ltd. v. Centon Ltd.*, No. C88-4947 DLJ, 1990 U.S. Dist. LEXIS



4558 (N.D. Cal. Mar. 15, 1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Burke*, 741 F. Supp. 191 (N.D. Cal. 1990); *In re Technical Equities Federal Securities Litigation*, Civil No. C-86-20157(A)-WAL, 1989 U.S. Dist. LEXIS 18405 (N.D. Cal. Aug. 22, 1989); *In re Centennial Savings & Loan Ass'n Litigation*, No. 87-1197 RHS, 1989 U.S. Dist. LEXIS 10675 (N.D. Cal. July 31, 1989); *Coman v. International Playtex, Inc.*, 713 F. Supp. 1324 (N.D. Cal. 1989); *National Computer, Ltd. v. Tower Industries, Inc.*, 708 F. Supp. 281 (N.D. Cal. 1989); *Kirkbride v. Continental Casualty Co.*, 707 F. Supp. 429 (N.D. Cal. 1989); *Gonick v. Drexel Burnham Lambert Inc.*, 711 F. Supp. 981 (N.D. Cal. 1988); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551 (N.D. Cal. 1988); *Saratoga Savings & Loan Ass'n v. Tate*, No. C-87-20603 WAL, 1988 U.S. Dist. LEXIS 16573 (N.D. Cal. Sept. 27, 1988); *Royal Service, Inc. v. Goody Products, Inc.*, No. C88-2758 TEH, 1988 U.S. Dist. LEXIS 15540 (N.D. Cal. Sept. 23, 1988); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 121 F.R.D. 402 (N.D. Cal. 1988); *Roberts v. Heim*, 670 F. Supp. 1466 (N.D. Cal. 1988); *The Movie 1 & 2 v. United Artists Communications, Inc.*, No. C 86-20390 RPA, 1988 U.S. Dist. LEXIS 11396 (N.D. Cal. Mar. 3, 1988); *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021 (N.D. Cal. 1988); *Modine Manufacturing Co. v. The Allen Group, Inc.*, 5 U.S.P.Q. 2d 1922 (N.D. Cal. 1987); *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486 (N.D. Cal. 1987); *Husby v. United States*, 672 F. Supp. 442 (N.D. Cal. 1987); *Elxsi v. Kukje America Corp.*, 672 F. Supp. 1294 (N.D. Cal. 1987); *Roberts v. Heim*, No. C 84-8069, 1987 U.S. Dist. LEXIS 15868 (N.D. Cal. Aug. 5, 1987); *Roberts v. Heim*, No. C 84-8069 TEH, 1987 U.S. Dist. LEXIS 15869 (N.D. Cal. June 11, 1987); *Garcia v. Hudson Lumber Co.*, 679 F. Supp. 961 (N.D. Cal. 1987); *National Ass'n of Radiation Survivors v. Turange*, 115 F.R.D. 543 (N.D. Cal. 1987); *Dutt v. United Airlines, Inc.*, No. C-86-3229 MHP, 1987 U.S. Dist. LEXIS 14908 (N.D. Cal. Apr. 20, 1987); *Worrell v. Uniforms to You & Co.*, 673 F. Supp. 1461 (N.D. Cal. 1987); *Blankenberg v. Commerical Insurance Co.*, 655 F. Supp. 223 (N.D. Cal. 1987); *American Metal Products, Inc. v. Sheet Metal Workers International Ass'n Local Union No. 104*, 124 L.R.R.M. 2950 (N.D. Cal. 1986); *Van Cleve v. United States*, No. C 85-7053, 1986 U.S. Dist. LEXIS 30957 (N.D. Cal. Oct. 24, 1986); *Northern California Food Employers & Retail Clerks Unions Benefit Fund v. Dianda's Italian-American Patry Co., Inc.*, 645 F. Supp. 160 (N.D. Cal. 1986); *In re Disonics Securities Litigation*, No. C-83-4584 RFP, 1986 U.S. Dist. LEXIS 22750 (N.D. Cal. July 15, 1986); *Johnson v. Smith*, 630 F. Supp. 1 (N.D. Cal. 1986).

*1993 Version: January 1, 1996–December 31, 2001*

CENTRAL DISTRICT (17): *Hart v. Baca*, 204 F.R.D. 456 (C.D. Cal. 2001); *Truesdell v. Southern California Permanente Medical Group*, 151 F. Supp. 2d 1174 (C.D. Cal. 2001); *Ulead System, Inc. v. Lex Computer & Management Corp.*, 151 F. Supp. 2d 1192 (C.D. Cal. 2001); *McAnally Enterprises v. McAnally*, 107 F. Supp. 2d 1223 (C.D. Cal. 2000); *Bermudez v. United States Department of Housing & Urban Development*, 84 F. Supp. 2d 1094 (C.D. Cal. 2000); *Davis v. Prentiss Properties Ltd.*, 66 F. Supp. 2d 1112 (C.D. Cal. 1999); *Velez v. Mohiuddin*, 84 A.F.T.R. 2d 99-6162, (C.D. Cal. 1999); *Digital Communications Network, Inc. v. AB Cellular Holding LLC*, No. 99-5418 CM (AJWx), 1999 U.S. Dist. LEXIS 15107 (C.D. Cal. Aug. 19, 1999); *Toxic Injuries Corp. v. Safety-Kleen Corp.*, 57 F. Supp. 2d 947 (C.D. Cal. 1999); *Continental Airlines, Inc. v. Weiner*, No. CV 98-10334 DT(ex), 1999 U.S. Dist. LEXIS 16377 (C.D. Cal. Mar. 29, 1999); *Fields v. Gates*, 184 F.R.D. 342 (C.D. Cal. 1999); *Gealer v. United States*, 82 A.F.T.R. 2d 98-5669 (C.D. Cal. 1998); *Robinson v. City of San Bernardino Police Department*, 992 F. Supp. 1198 (C.D. Cal. 1998); *Cable & Computer Technology v. Lockheed Saunders, Inc.*, 175 F.R.D. 646 (C.D. Cal. 1997); *ADO Finance, AG, v. McDonnell Douglas Corp.*, 938 F. Supp. 590 (C.D. Cal. 1996); *Remington Investments, Inc. v. Kadenacy*, 930 F. Supp. 446 (C.D. Cal. 1996); *Stussy v. United States*, No. CV 95-7882-WMB, 1996 U.S. Dist. LEXIS 6664 (C.D. Cal. Feb. 16, 1996).

NORTHERN DISTRICT (37): *Emma C. v. Eastin*, No. C-96-4179 TEH, 2001 U.S. Dist. LEXIS 16119 (N.D. Cal. Oct. 4, 2001); *Rooz Abras Eftekhari v. Peregrine Financials & Securities*, No. C 00-3594 JL, 2001 U.S. Dist. LEXIS 16087 (N.D. Cal. Sept. 24, 2001); *Terflinger v. Winslow*, No. C 00-1631 CRB (PR), 2001 U.S. Dist. LEXIS 15442 (N.D. Cal. Sept. 5, 2001); *Hill Physicians Medical Group, Inc. v. PacifiCare of California*, No. C 01-0318 SI, 2001 U.S. Dist. LEXIS 6051 (N.D. Cal. Apr. 23, 2001); *Burgess v. City and County of San Francisco*, No. C 00-4198 CRB, 2001 U.S. Dist. LEXIS 3184 (N.D. Cal. Mar. 16, 2001); *Uriarte v. R & J Machinery*, No. C 00-03196 WHA, 2000 U.S. Dist. LEXIS 18084 (N.D. Cal. Dec. 4, 2000); *Quigley v. Pennsylvania Higher Education Assistance Administration*, No. C 00-1661 CRB, 2000 U.S. Dist. LEXIS 11957 (N.D. Cal. Aug. 14, 2000); *Bader v. Electronics for Imaging, Inc.*, 195 F.R.D. 659 (N.D. Cal. 2000); *McMahon v. Best*, No. C-00-00616, 2000 U.S. Dist. LEXIS 10872 (N.D. Cal. July 28, 2000); *Braun v. California Bureau of State Audits*, No. C 994841 VRW, 2000 U.S. Dist. LEXIS 10072 (N.D. Cal. July 11, 2000);

Kotakis v. Gruntal & Co., No. C97-0202 CRB, 2000 U.S. Dist. LEXIS 10094 (N.D. Cal. July 11, 2000); Woodward v. Goodwin, No. C 99-1103 MJJ, 2000 U.S. Dist. LEXIS 7642 (N.D. Cal. May 12, 2000); Travelers Indemnity Co. v. Navigators Insurance Co., No. C 99-4509 CRB, 2000 U.S. Dist. LEXIS 6702 (N.D. Cal. May 8, 2000); Abito v. United Airline, No. C99-0085 SC, 2000 U.S. Dist. LEXIS 5912 (N.D. Cal. May 1, 2000); Salazar v. Golden State Warriors, No. C-99-4825 CRB, 2000 U.S. Dist. LEXIS 2366 (N.D. Cal. Feb. 29, 2000); Royce International Broadcasting Corp. v. Field, No. C99-4169 SI, 2000 U.S. Dist. LEXIS 2369 (N.D. Cal. Feb. 22, 2000); Gibson v. Chrysler Corp., Nos. C-99-1047 MHP, C-99-1048 MHP, C-99-1049 MHP, 1999 U.S. Dist. LEXIS 22305 (N.D. Cal. May 28, 1999); Gemisys Corp. v. Phoenix Americans, Inc., 186 F.R.D. 551 (N.D. Cal. 1999); Paciulan v. George, 38 F. Supp. 2d 1128 (N.D. Cal. 1999); Taylor v. Central Contra Costa Transit Authority, No. C 98-4030 CRB, 1999 U.S. Dist. LEXIS 1205 (N.D. Cal. Jan. 27, 1999); Copperstone v. TCSI Corp., No. C 97-3495 SBA, 1999 U.S. Dist. LEXIS 20978 (N.D. Cal. Jan. 14, 1999); Vigil v. Walt Disney Co., No. C-97-4147 MHP, 1998 U.S. Dist. LEXIS 22853 (N.D. Cal. Dec. 1, 1998); County of Sonoma v. Bisso, No. C-98-3225 SI, 1998 U.S. Dist. LEXIS 17861 (N.D. Cal. Nov. 6, 1998); Hancock v. Hitt, No. C-98-960 MMC, 1998 U.S. Dist. LEXIS 10058 (N.D. Cal. June 19, 1998); Ghorbani v. Pacific Gas & Electric Co., No. C97-2730 FMS, 1998 U.S. Dist. LEXIS 7789 (N.D. Cal. May 22, 1998); Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215 (N.D. Cal. Apr. 29, 1998); McCormick v. Travelers Insurance Co., No. C98-0641 TEH, 1998 U.S. Dist. LEXIS 6054 (N.D. Cal. Apr. 28, 1998); Hershops v. Maher, No. C-97-3114 CRB, 1998 U.S. Dist. LEXIS 2880 (N.D. Cal. Mar. 10, 1998); VSL Corp. v. General Technologies, 46 U.S.P.Q. 2d 1356 (N.D. Cal. 1998); On Command Video Corp. v. Lodgenet Entertainment Corp., 976 F. Supp. 917 (N.D. Cal. 1997); Giovanni v. Sea-Land Service, Inc., No. C-95-4259 MMC, 1997 U.S. Dist. LEXIS 14004 (N.D. Cal. Apr. 28, 1997); Grecco v. Sanofi Winthrop Pharmaceuticals, No. C-96-3876 FMS, 1997 U.S. Dist. LEXIS 23391 (N.D. Cal. Feb. 13, 1997); Minden v. City of Monte Sereno, Civil No. 96-20362 SW, 1996 U.S. Dist. LEXIS 21970 (N.D. Cal. Nov. 25, 1996); Salvioli v. Continental Insurance Co., No. C 96-0630 FMS, 1996 U.S. Dist. LEXIS 13094 (N.D. Cal. Aug. 30, 1996); Cariveau v. Farmers New World Life Insurance Co., No. C-95-1583 MHP, 1996 U.S. Dist. LEXIS 12360 (N.D. Cal. Aug. 20, 1996); Sonsten v. Moreno, No. C-95-1941 MHP, 1996 U.S. Dist. LEXIS 12030 (N.D. Cal. July 31, 1996); Cinquini v. Donohoe, No. C 95-4168 FMS, 1996 U.S. Dist. LEXIS 2131 (N.D. Cal. Feb. 7, 1996).

## APPENDIX 5: SUMMARY OF CASES BY CATEGORY

## DISTRICT COURTS

*Type of Case\**

	Contract	Other Commercial	Civil Rights	Personal Injury	Total
Total Cases	14	24	37	14	89
Plaintiff/attorney target	9	16	30	12	
Plaintiff sanctions imposed	3	2	19	2	
Plaintiff sanctions denied	6	14	13	10	
Defendant/attorney target	5	8	7	2	
Defendant sanctions imposed	0	1	1		
Defendant sanctions denied	5	7	6	2	

## APPELLATE COURTS

*Type of Case\**

	Contract	Other Commercial	Civil Rights	Personal Injury	Total
Total Cases	9	12	16	3	40
Plaintiff/attorney target	5	10	15	3	
Plaintiff sanctions imposed	3	10	13	2	
Plaintiff affirmed	1	5	6		
Plaintiff reversed	2	8	8	2	
Defendant/attorney target	4	2	1		
Defendant sanctions imposed	3	2	0		
Defendant affirmed	1		1		
Defendant reversed	3	2			

## DISTRICT &amp; APPELLATE COURT TOTALS

	<i>Type of Case*</i>				
	Contract	Other Commercial	Civil Rights	Personal Injury	Total
Total Cases	23	36	53	17	129**
Plaintiff/attorney target	14	26	45	15	99
Plaintiff sanctions imposed	6	12	32	4	53
Defendant/attorney target	9	10	8	2	30
Defendant sanctions imposed	3	3	1	0	8
Plaintiff/attorney target	61%	72%	85%	88%	77%
Plaintiff sanctions imposed	43%	46%	71%	27%	54%
Defendant attorney target	39%	28%	15%	12%	23%
Defendant sanctions imposed	33%	30%	13%	0%	27%

\* The categories used here reflect the ones used in the AJS study. *See generally* Marshall, *supra* note 10, at 965. Of the four categories, only “other commercial” was specifically defined as combining commercial litigation, antitrust, corporation law, banking law, insurance coverage, lender liability, securities, dealership and franchise, copyright, patents, and other intellectual property, and trademarks. *Id.*

\*\* One hundred and thirty-five cases were collected for this Article. In several instances, however, it was not possible to tell what the type of case was from the opinion. Hence, the total reflected in Appendix 4 is one hundred and twenty-nine.